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No. ——

IN THE
Supreme Court of the United States

MASSACHUSETTS FOOD ASSOCIATION, *et al.*,
Petitioners,

v.

MASSACHUSETTS ALCOHOLIC BEVERAGE CONTROL COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state statutes that otherwise irreconcilably conflict with Section 1 of the Sherman Act escape preemption simply because the private parties are not required to reach an agreement on the anticompetitive conduct?

2. Whether state statutes that irreconcilably conflict with Section 1 of the Sherman Act can escape preemption where the state has engaged in no active supervision of the conduct by private parties whatsoever?

LIST OF PARTIES

Petitioners Massachusetts Food Association, Roche Bros. Supermarkets, Inc., The Stop & Shop Companies, Inc., Packaging Center, Inc., BJ's Wholesale Club, Inc., Mormax Corporation, The Edwin R. Sage Company, Inc., Trader Joe's Co. and Trader Joe's East, Inc. were appellants in United States Court of Appeals for the First Circuit. The Massachusetts Alcoholic Beverages Control Commission Commissioners Walter Sullivan, Suzanne Iannella and Frederick Riley were appellees in the court of appeals and are the respondents here.

RULE 29.6 LISTING

Massachusetts Food Association has no parent corporations and no nonwholly owned subsidiaries.

Roche Bros. Supermarkets, Inc. has no parent corporations and no nonwholly owned subsidiaries.

The Stop & Shop Companies, Inc. is a wholly-owned subsidiary of Ahold USA Holdings, Inc., which is a wholly-owned subsidiary of Koninklijke Ahold nv. Packaging Center, Inc is a wholly-owned subsidiary of The Stop & Shop Companies, Inc. and has no nonwholly owned subsidiaries.

BJ's Wholesale Club, Inc. has no parent corporations and no nonwholly owned subsidiaries. Mormax Corporation is a wholly-owned subsidiary of BJ's Wholesale Club, Inc. and has no nonwholly owned subsidiaries.

The Edwin R. Sage Company, Inc. has no parent corporations and no nonwholly owned subsidiaries.

Trader Joe's Co has no parent corporations and no nonwholly owned subsidiaries. Trader Joe's East, Inc. is a wholly-owned subsidiary of Trader Joe's Co. and has no nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, reported at 197 F.3d 560 (1st Cir. 1999), is set forth in Appendix A. The opinion of the United States District Court for the District of Massachusetts, reported at 184 F.R.D. 217 (D. Mass. 1999), is set forth in Appendix B. The district court's order of dismissal is set forth in Appendix C.

STATEMENT OF JURISDICTION

The opinion of the court of appeals affirming the district court's order dismissing petitioners' amended complaint was entered on December 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article VI of the United States Constitution provides in part that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." This case involves Section 1 of the Sherman Act, 15 U.S.C. § 1 (1999), which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

At issue under the Supremacy Clause and Section 1 is a Massachusetts statute, MASS. GEN. LAWS ch. 138, § 15 (1999), which provides in pertinent part:

> The local licensing authorities in any city or town . . . may grant licenses for the sale at retail of such alcoholic beverages . . . not to be drunk on the premises, to applicants therefor . . . . No person, firm, corporation, association, or other combination of persons, directly or indirectly, or through any agent, employee, stockholder, officer or other person or any subsidiary whatsoever, shall be granted, in the aggregate, more than three such licenses in the commonwealth . . . .

STATEMENT OF THE CASE

A. Statement of Facts

In 1933, concurrent with the repeal of prohibition, Massachusetts enacted a series of statutes governing the trade of alcoholic beverages throughout the state. Contemporaneously several other states enacted similar regulatory regimes.

In 1998, a group of Massachusetts liquor retailers raised a Sherman Act challenge to that portion of the Massachusetts liquor regulatory scheme that required liquor wholesalers to post their prices and adhere to those prices for a period of one month. MASS. GEN. LAWS ch. 138, § 25A. The district court held that the statute and related regulations irreconcilably conflicted with Section 1 of the Sherman Act and that Massachusetts was not entitled to state-action immunity, even though the statute did not require any agreement between the wholesalers. *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp. 2d 41, 51 (D. Mass. 1998), *appeal dismissed by Sea Shore Corp. v. Sullivan*, 158 F.3d 51 (1st Cir. 1998) (preempting horizontal price post-and-hold statute). Wholesalers of alcoholic beverages in Massachusetts are now free to price their product as they see fit and compete aggressively, as intended under the Sherman Act.

In this case, petitioners challenged another portion of the Massachusetts liquor regulatory regime—the Massachusetts statute that limits every retailer of alcoholic beverages to only three stores throughout the entire state. MASS. GEN. LAWS ch. 138, § 15. Petitioners are retailers engaged in the sale of food, general merchandise and alcoholic beverages in Massachusetts and their trade association. Although each petitioner-retailer operates more than three retail stores in Massachusetts, each is limited by the statute to selling alcoholic beverages at only three

of its stores. For example, petitioner Stop & Shop operates 93 supermarkets in the Commonwealth of Massachusetts, yet is limited under the statute to selling alcoholic beverages at only three of its locations. But for the statute, each petitioner-retailer would sell alcoholic beverages at more of its stores.

Predictably, the Massachusetts three-store limit statute has created anticompetitive local markets for the sale of liquor throughout Massachusetts. As the court of appeals and the district court held, and the parties concede, the statute mandates conduct that would be a *per se* violation of Section 1 of the Sherman Act if the subject of a private agreement. The statute's flat three-store limit restricts every competitor's number of outlets, thereby raising prices higher than in competitive markets in other states. Although Massachusetts has mandated conduct in direct and irreconcilable conflict with the Sherman Act, it does not actively supervise the anticompetitive effects of its alcohol regime. Massachusetts' lone supervisory act is to enforce its three-store limit. Massachusetts does not evaluate the overall location and distribution of retail liquor outlets throughout the state; private actors are free to allocate territories as they see fit. It also does not ensure that the discretion given to private market participants comports with its regulatory objectives. Nor does Massachusetts regulate or supervise the anticompetitive pricing power bestowed upon liquor retailers. Massachusetts does nothing except restrict each retailer to three outlets. Petitioners contend that Massachusetts must engage in some degree of regulation or review, otherwise the statute is preempted.

B. Proceedings Below

Petitioners challenged the constitutionality of the statute in the United States District Court for the District

of Massachusetts. The jurisdiction of the district court was invoked under 15 U.S.C. §§ 15, 26 and 28 U.S.C. §§ 1331, 2201(a). Petitioners asserted that the Massachusetts statute constitutes an output and territorial restriction that irreconcilably conflicts with Section 1 of the Sherman Act, 15 U.S.C. § 1, and is therefore preempted pursuant to the Supremacy Clause of the United States Constitution. Respondents moved to dismiss the action for failure to state a claim upon which relief can be granted. The district court granted the motion and dismissed petitioners' amended complaint.

Petitioners appealed to the United States Court of Appeals for the First Circuit. On December, 1999, the court of appeals affirmed the district court's order. Pet. App. 1a. The court of appeals agreed with petitioners that the Massachusetts statute contemplated *per se* unlawful conduct, but held that the statute escaped preemption because it did not require or authorize the liquor retailers to enter into private arrangements or agreements that suppress competition. Pet. App. 6a.

REASONS FOR GRANTING THE WRIT

This case presents a unique opportunity for this Court to address the issues governing preemption of state-compelled, *per se* illegal conduct under the Sherman Act. This case is of the utmost importance, first, because the First Circuit's abbreviated approach to Sherman Act preemption jurisprudence fails to comport with this Court's decisions and, second, because its holding creates a clear and direct conflict with the Ninth Circuit. This Court's consideration is especially necessary in light of the court of appeals' own assessment that existing "case law [in the area of Sherman Act preemption] is not entirely coherent." Pet. App. 4a.

This Court has made clear that "Congress exercis[ed] all the power it possessed under the Commerce Clause when it approved the Sherman Act." *California Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980) (citation omitted) ("*Midcal*"). As a result, this Court consistently has preempted state liquor statutes that mandate conduct constituting a *per se* restraint of trade as being in irreconcilable conflict with the Sherman Act. *See, e.g., 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342-43 (1987) ("*Duffy*"); *Midcal*, 445 U.S. at 103; *Schwegmann Bros. v. Calvert Distillers*, 341 U.S. 384 (1951) ("*Schwegman*").[1]

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[1] *See also Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2nd Cir. 1993) (preempting horizontal statute that "removes one element of competition in car rental pricing" as mandating *per se* unlawful conduct under the Sherman Act); *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987) (holding that an Oregon statute requiring that beer and wine distributors adhere to previously announced prices was a *per se* violation of the Sherman Act and thereby preempted); *Beer & Pop Warehouse v. Jones*, 41 F. Supp.2d 552 (M.D. Pa. 1999) (enjoining horizontal price and hold statute because it was a *per se* violation of the Sherman Act); *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp.2d 41 (D. Mass. 1998) *appeal dismissed by Sea Shore Corp. v. Sullivan*, 158 F.3d 51 (1st Cir. 1998) (preempting horizontal price post-and-hold statute that required liquor distributors to adhere to a price schedule because it constituted a *per se* violation of the Sherman Act); *Anheuser-Busch, Inc. v. Goodman*, 745 F. Supp. 1048 (M.D. Pa. 1990) (striking down Pennsylvania alcohol price regulation regime as a *per se* violation of the Sherman Act); *State of Kansas v. Lamb*, 1987-1 Trade Cases (CCH) ¶ 67,521 (D. Kan. 1987) (preempting a minimum price markup statute); *Alcoholic Beverages Control Bd. v. Taylor Drug Stores, Inc.*, 635 S.W.2d 319 (Ky. 1982) (holding that provisions of Kentucky Distilled Spirts and Wine Fair Trade Act violated the Sherman Act because the act allowed for state sanctioned retail price maintenance); *Lewis-Westco & Co. v. Alcoholic Beverages Control Appeals Bd.*, 186 Cal. Rep. 552 (Cal. Ct. App. 1982) (preempting horizontal price posting alcohol statute as mandating *per se* unlawful conduct under the Sherman Act).

Those state laws that mandate private conduct falling under rule of reason analysis rather than *per se* treatment are not preempted

I. THE DECISION OF THE COURT OF APPEALS IS FUNDAMENTALLY AT ODDS WITH THE DECISIONS OF THIS COURT AND DISRUPTS THE FABRIC OF SHERMAN ACT PREEMPTION JURISPRUDENCE

Although this Court has been exceptionally rigorous in limiting federal preemption to a few narrow applications, one such application consistently arises when a state statute impedes upon the basic economic freedoms guaranteed by the Sherman Act. Noting that in the typical preemption case the "inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes," this Court made clear in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982) ("*Rice*"), that a state statute is struck down under the Sherman Act "only if the statute on its face irreconcilably conflicts with federal antitrust policy." *Id.* at 659. This Court held that a state statute is void:

> only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that

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under the Sherman Act. *See, e.g., Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). The vast majority of commercial arrangements are evaluated under rule of reason analysis, and this Court has recently narrowed the zone of private conduct subject to *per se* treatment. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3 (1997) (vertical agreements that limit maximum resale price maintenance do not constitute *per se* violations of Section 1 of the Sherman Act). Thus, no rampant reexamination of state statutes, as feared by the court of appeals, is threatened here; only those rare statutes mandating conduct by private parties that would be a *per sse* violation of Section 1 would ever be scrutinized.

> category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Id. at 661.

A statute that is otherwise preempted under *Rice*, however, will survive if the state qualifies for state-action immunity consistent with this Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943). State-action immunity requires that: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105 (citation omitted). Together these principles ensure that the Sherman Act will invalidate only those state regulatory regimes that both irreconcilably conflict with federal antitrust policy and are not the product of state involvement.

The *Rice* progeny amply reveal a well-worn path of judicial analysis for assessing whether the Sherman Act preempts a state statute. A court must first determine whether the statute authorizes or mandates conduct properly characterized as falling within one of a few well-defined categories of conduct considered *per se* unlawful if the subject of a private agreement. *See, e.g., Duffy*, 479 U.S. at 341; *Midcal*, 445 U.S. at 102. Where the answer is no, the inquiry is complete and the state statute does not facially conflict with the Sherman Act. *See, e.g., Rice*, 458 U.S. at 661 (holding that vertical non-price restraint was not *per se* unlawful conduct). If the answer is yes, then the statute is subject to preemption but the court must determine whether the regulatory regime is

exempt state action. *See, e.g., Duffy*, 479 U.S. at 343; *Midcal*, 445 U.S. at 103.

In this case all the parties and the courts concede a *per se* violation of the antitrust laws; thus under *Rice*, Massachusetts must undertake some form of "active supervision" of the private parties, which it squarely has not done; otherwise, the statute is preempted.

The court of appeals departed from this analytical framework. Although the First Circuit conceded that the conduct mandated by the Massachusetts statute would constitute a *per se* violation of the federal antitrust laws if agreed to by private parties, it held that an otherwise *per se* unlawful state statute nevertheless escapes preemption by the Sherman Act if it does not require an agreement or concerted activity among the private market actors. Pet. App. 6a. The court of appeals stated that in this case:

> there is nō private agreement or arrangement between retailers as to the number of retail outlets and therefore no violation to be shielded. The state simply insists upon licensing retail liquor stores—as it does for many businesses or professions—and limits the number of licenses to three per owner.

Pet. App. 6a. The First Circuit therefore never even considered the degree of state regulation of the anticompetitive conduct, unlike *Duffy* or *Midcal*.

In no other case has the standard Sherman Act preemption analysis been derailed by the absence of a private agreement. Although an "agreement" is the cornerstone of any Sherman Act prosecution of private parties, in the preemption context state compulsion or authorization of an anticompetitive marketplace stands in place of the agreement. The *Rice* formulation does not stipulate that preemption of a statute turns upon anything other

than the character of the restraint, much less upon the existence of a "private agreement or arrangement." Indeed, the decisions of this Court firmly establish that a private agreement is not required for preemption.

In both *Midcal* and *Duffy*, this Court invalidated state statutes because they "*mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act." *Duffy*, 479 U.S. at 343 (emphasis in original; citations omitted). In neither case was there a private agreement among competitors to engage in price fixing. Indeed, this Court expressly rejected the argument that a private agreement was required in the preemption context. *Id.* at 345 n.8 ("[We] reject appellees' contention that there is no 'contract combination . . ., or conspiracy, in restraint of trade."). The question presented is whether the state law is on its face in conflict with the Sherman Act. In both cases, the impetus for the private conduct was the state regulation and this alone was sufficient for the statute to be preempted.

Sandwiched between *Midcal* and *Duffy* is this Court's decision in *Fisher v. Berkeley*, 475 U.S. 260 (1986), on which the court of appeals relied heavily. This is the lone case offering an inkling of support for the court of appeals' novel approach to preemption. Under the rent-control regime at issue in that case, the municipal reviewing board for the City of Berkeley implemented strict rent ceilings fixing the maximum rental prices for every parcel of real property, reviewed annually the rent ceilings to allow increases in response to market conditions, and permitted landlords to exceed the prescribed rents only with the express approval of the reviewing board. *Id.* at 262. Berkeley's system of supervision and control over rental prices prevented all non-state-sanctioned anti-competitive action because landlords in Berkeley were without discretion to charge prices above the maximum

rents established by the reviewing board. After reviewing Berkeley's regulatory scheme, including its annual pricing review and case-by-case review of individual appeals, the *Fisher* Court held that the regime was not preempted because "control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of those properties and given to the [municipal reviewing board]." *Id.* at 267. In short, Berkeley, not the private landlords, had "complete control" of pricing.

In reaching its conclusion, the *Fisher* Court noted that its earlier decisions concerning prosecution of private parties under Section 1 of the Sherman Act always required "concerted effort by more than one entity." *Id.* at 266. Relating those decisions to a case of preemption, the *Fisher* Court differentiated between so-called "hybrid" restraints and "unilateral" restraints. Hybrid restraints were described as those granting "a degree of private regulatory power;" such as the restraints in *Midcal* and *Schwegmann*. *Id.* at 267-68 (quoting *Rice*, 458 U.S. at 665). The restraint in *Fisher* was not so characterized because the Berkeley regime "places complete control over maximum rent levels exclusively in the hands of the [municipal reviewing board]." *Id.* at 269. Thus, in *Fisher* terms, where a statute, rather than private parties through an agreement, mandates conduct that is *per se* illegal, the statute will be preempted only if private parties are left with competitive discretion that goes unsupervised by the state.

This was made clear the following term, as this Court underscored the import of the *Fisher* discussion in *Duffy* by addressing it only in the context of the active supervision requirement. *Duffy*, 479 U.S. at 345 n.8. The First Circuit, however, never reached any analysis of the active supervision requirement, making no inquiry of the

Commonwealth's administration of its three-store-limit. It simply held that the statute escaped preemption because there was no private agreement. In essence, it adopted a *Fisher* conclusion but short-circuited the analysis prescribed by this Court by following a literal interpretation of the "agreement" requirement.

The decisions of this Court do not support the truncated analysis performed by the court of appeals. Especially in an area as uniquely consequential as preemption, the lower courts must adhere closely to the principles enunciated by this Court. Despite the court of appeals' characterization of Sherman Act preemption jurisprudence as "not entirely coherent" (Pet. App. 4a), this Court has made it abundantly clear that the subordination of unlawful state statutes to the principles of economic freedom embodied in the Sherman Act does not turn on the existence of a private agreement.

II. THERE IS A CLEAR AND DIRECT CONFLICT BETWEEN THE FIRST AND NINTH CIRCUITS AS TO THE REQUIREMENT OF A PRIVATE AGREEMENT FOR SHERMAN ACT PREEMPTION

The First and Ninth Circuits are split on the requirements for Sherman Act preemption of state statutes. The First Circuit held below that even though a statute requires private parties to engage in *per se* unlawful behavior, the absence of an agreement among regulated parties closes the door to further analysis and spares the state statute from preemption under the Sherman Act. On the other hand, the Ninth Circuit has held that the lack of an agreement is not dispositive. The import of the disagreement among the Circuits is that the statutes of different states may impinge upon competition in an identical manner, but one statute may be preempted by the Sherman Act while the other perseveres. The resulting split

among the courts of appeals creates uneven application of the Sherman Act among the several states.

A. The First Circuit's Decision Rejects The Ninth Circuit's Holding That A Private Agreement Is Not Required For Sherman Act Preemption

The Ninth Cicuit held in *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), that a statute may irreconcilably conflict with the Sherman Act and be preempted even though the statute does not require a private agreement. In that case, Oregon enacted regulations requiring liquor retailers to maintain posted retail beer and wine prices. The court found that the restraint on trade was "unlawful *per se* under the Sherman Act." *Id.* at 1349. The state had argued that the regulations did not irreconcilably conflict with the Sherman Act because there was no agreement or concerted activity to fix prices among the regulated parties who acted only in conformity with the regulations. *Id.* The Ninth Circuit flatly rejected the state's argument:

> The appellees' treatment of this difficult issue oversimplifies it. While it is true that there is no agreement or concerted activity among the wholesalers, it can not be ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices. In other words, the state compels activity that would otherwise be a *per se* violation of the Sherman Act. It is the presence of state compulsion that requires a more refined analysis than the one presented by the appellees. Simply ending the analysis because of a lack of concerted activity among the wholesalers fails to take into account the presence and effect of the state's involvement in the matter.

Id. The court went on to hold that the Oregon regulations were not "unilateral state action" for two reasons. First,

as established in *Schwegmann*, "a showing of concerted activity among the Oregon wholesales is not necessary to establish an antitrust violation. The mere fact that each wholesaler complies unilaterally with the regulations does not save an impermissible pricing scheme from an antitrust challenge." *Id.* at 1350. Second, as in both *Schwegmann* and *Midcal*, "Oregon allows private parties to set the prices and does not review the reasonableness of those prices." *Id.* at 1351. In sharp contrast, the First Circuit has required a showing of concerted activity in order to preempt an otherwise unlawful state statute. As a result, the court of appeals found it unnecessary to undertake the *Midcal* analysis of whether Massachusetts actively supervised the anticompetitive effects of its regime.

B. The First Circuit's Decision Creates Enormous Confusion And Uncertainty On The Important Question Of The Extent Of Federal Preemption By The Sherman Act Of State Liquor Laws

It is of the utmost importance that the tenets of the Sherman Act be enuciated clearly and applied uniformly among the states, particularly where *per se* violations of the Sherman Act are involved. This Court has emphasized that the Sherman Act "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). Accordingly, this Court has not shied from invalidating state measures that encroach upon these basic economic precepts. *See, e.g., Duffy*, 479 U.S. 335; *Midcal*, 445 U.S. 97; *Schwegmann*, 341 U.S. 384. Those efforts are futile, however, if the bounds of our economic rights vary at each state's edge.

Even the court of appeals conceded that its decision would muddle further the already murky waters of Sher-

man Act preemption analysis. The court of appeals rationalized its novel departure from the prior case law and the law of sister courts by observing that this Court's decisions in the Sherman Act preemption area are plagued by "resulting ambiguities." Pet. App. 4a. The court of appeals went on to observe that the prior precedents, including *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny *Patrick v. Burget*, 486 U.S. 94 (1988), and *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 384 (1951), "have provoked endless litigation." Pet. App. 5a. Finally the court of appeals expressed concern that the "case law is not entirely coherent." Pet. App. 4a.

The First Circuit's novel decision will only foster additional litigation and result in uncertainty in this important area. The result of the court of appeals' analysis is to make unclear the application of the Sherman Act and Supremacy Clause to the laws of a number of states regulating retail liquor sales by private parties. The court of appeals ruling also creates uncertainty as to the legality of enforcement efforts by state alcohol regulators.

In their liquor laws, many states regrettably have compelled *per se* violations of the Sherman Act. In the area of *per se* limitations on the ability of a competitor to open stores, a number of states limit the number of retail locations absolutely to some arbitrary number, rather than engage in active state supervision.[2] Given the volume of

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[2] *See* ARK. CODE ANN. § 3-4-205(b)(1) (limiting retail liquor licenses to one); CONN. GEN. STAT. § 30-48(a) (limiting retail liquor licenses to two); DEL. CODE ANN. tit. 4 § 546 (limiting retail liquor licenses to two); GA. COMP. R. & REGS. r. 560-2-2-.40 (limiting retail liquor licenses to two); MD. CODE OF 1957, ART. 2B § 9-102 (limiting retail liquor licenses to one); MINN. STAT. § 340A.412 (limiting retail liquor licenses to one); N.J. STAT. ANN. § 33:1-12.31 (limiting retail liquor licenses to two); PA. STAT. ANN. tit. 47 § 4-438 (limiting retail liquor licenses to one);

commerce in alcohol, the overriding federal policy in favor of free markets expressed in the Sherman Act and the important state interests at stake, certiorari is warranted to ensure that lower courts be given a coherent, well-demarcated, state-federal boundary.

III. THE TRUNCATED ANALYSIS BY THE COURT OF APPEALS OF THE MASSACHUSETTS LIQUOR STATUTE AVOIDS ANY ANALYSIS OF THE DEGREE OF STATE REGULATION OR REVIEW AND CREATES A CONFLICT IN THE CIRCUITS

The Commonwealth of Massachusetts permits private parties to sell liquor through retail stores. Many states, such as Virginia, limit liquor sales through state-run ABC stores; such retail sales by the state obviously pass Sherman Act muster given the high degree of active supervision when the state itself acts as the relevant economic actor. *See Duffy*, 479 U.S. at 344 n.6 ("Such comprehensive regulation is immune under *Parker v. Brown* because the State substitutes its own power for 'unfettered business freedom.'") (citation omitted); *Midcal*, 445 U.S. at 106 n.9 (same).

The Commonwealth of Massachusetts for purposes of this appeal has conceded that it undertakes no supervision of private parties whatsoever. The Commonwealth does not regulate private stores' retail liquor prices. The Commonwealth does not review the private stores' prices. The Commonwealth does not actively supervise how the private economic actors allocate the stores throughout the state. The resulting pricing and location of competition is de-

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S.C. CODE ANN. § 61-6-140 (limiting retail liquor licenses to three); TEX. ALCO. BEV. § 22.04 (limiting retail liquor licenses to five); VT. STAT. ANN. tit. 7 § 229 (limiting retail liquor licenses to one). Whether and to what degree these states engage in "active supervision," as understood under *Parker*, is not before this Court.

termined solely by private actors. The Commonwealth has abrogated its responsibility to the benefit of these private actors. Having limited the number of stores absolutely, the Commonwealth cedes all decisions as to the allocation of stores and competitive behavior to private firms.

The ultimate result is predictable under the Sherman Act. Having selected an economic system that is different from that of free competition and market economics, the state's unwillingness to participate in the resulting anti-competitive marketplace leads to higher prices for consumers and reduced consumer choices.

Unlike the Ninth Circuit in *Miller*, or this Court in *Duffy*, *Fisher* and *Midcal*, the First Circuit has eliminated such indicia of active state supervision from the analysis. The First Circuit's truncated review of the state regulatory regime effectively eliminates Sherman Act preemption altogether. The First Circuit's apparent justification for truncating its analysis, apart from the absence of a private agreement, is its view that, for hybrid restraints, the state statute must expressly grant "a degree of private regulatory power" on the face of the statute. *See* Pet. App. 8a-9a. ("The Massachusetts statute limiting licenses to three per company does not . . . permit any competitor to determine the price or location of another."). By refusing to examine what the state has failed to do, after the state has mandated conduct that is *per se* illegal under the Sherman Act, the First Circuit's approach turns the relevant pre-emption analysis on its head. The First Circuit's approach avoids any consideration of the lack of state supervision or involvement in the resulting economic system altogether.

Neither the prior approach of this Court in *Duffy*, in the context of active state supervision, or the approach of this Court in *Fisher*, in the context of reviewing a hybrid restraint, refused to examine the degree of governmental

involvement in the resulting economic system, once free markets are abandoned. *See Duffy*, 479 U.S. at 343-45 (reviewing the absence of state control or review of pricing and the absence of a pointed reexamination); *Fisher*, 475 U.S. at 366 (reviewing aspects of Berkeley's rent control regime, including annual re-assessment and case-by-case review in concluding that "complete control" of pricing was with the government). The Ninth Circuit in *Miller*, following these decisions, reviewed the state's degree of involvement in the resulting economic regime and found a complete lack of state involvement in the private parties' pricing decisions:

> Oregon "neither establishes prices nor reviews the reasonableness of the price schedules . . . [nor does it] monitor market conditions or engage in any 'pointed reexamination' of the program." *Midcal, supra*, 455 U.S. at 105-06 [100 S. Ct. at 943-44] . . . . Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. . . . Oregon merely authorizes and enforces the disputed practices."

813 F.2d at 1351. Other courts have followed the Ninth Circuit's approach.[3]

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[3] *See, e.g., Canterbury Liquors*, 16 F. Supp.2d at 48-51 (preempting price post-and-hold statute where Mass. Alcoholic Beverage Control Commission lacked the statutory authority to review or revise prices of alcohol); *Anheuser-Busch*, 745 F. Supp. at 1052-54 (expressly following *Miller* analysis, pre-empting state alcohol law where state did not set prices and had "no control over the reasonableness of the prices set;" state's enforcement of statute insufficient to constitute active supervision); *Lamb*, 1987-1 Trade Cases (CCH) ¶ 67,521 at 60,191-92 (preempting state alcohol law where the state "does not monitor market conditions or engage in any reexamination of the system. . . . This fact represents a complete abdication of the system to the wholesale distributors"); *Taylor Drug Stores*, 635 S.W.2d at 321-22 (preempting state alcohol law

The novel, truncated analysis of the First Circuit permits the private economic actions themselves to allocate markets and limit when and where output is sold, because private parties in Massachusetts determine where to establish liquor locations and make pricing decisions without state supervision or involvement. A truncated analysis of state law that fails to review the competitive discretion afforded private parties, who operate in an economic system in which competition has been curtailed by state-imposed *per se* limits on competitors, leads erroneously to the approval of a state law in facial conflict with the Sherman Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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where "the state has nothing to do with prices and the pricing of wines and liquors" except to enforce minimum price markup law); *Lewis-Westco*, 186 Cal. Rptr. at 557-58.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1277

MASSACHUSETTS FOOD ASSOCIATION, *et al.*,
Plaintiffs, Appellants,

v.

MASSACHUSETTS ALCOHOLIC BEVERAGES
CONTROL COMMISSION, *et al.*,
Defendants, Appellees.

No. 99-1280

MASSACHUSETTS FOOD ASSOCIATION, *et al.*,
Plaintiffs, Appellees,

v.

MASSACHUSETTS ALCOHOLIC BEVERAGES
CONTROL COMMISSION, *et al.*,
Defendants, Appellees,

and

WINE & SPIRIT WHOLESALERS OF MASSACHUSETTS, INC.,
et al.,
Appellants.

Appeals from the United States District Court
for the District of Massachusetts
(Hon. Douglas P. Woodlock, *U.S. District Judge*)

Before

Boudin, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and *Lipez, Circuit Judge*.

December 2, 1999

BOUDIN, *Circuit Judge*. Massachusetts, like many other states, extensively regulates the sale of alcoholic beverages. Among other restrictions, retail outlets must be licensed, each license embraces only a single location, and no firm or person is allowed "more than three such licenses in the commonwealth . . . ." Mass. Gen. Laws ch. 138, § 15 (1998). Thus, no one can own more than three retail liquor stores in the Commonwealth. Although some state regulations also impinge on retail prices, *e.g.*, Mass. Gen. Laws ch. 138, § 25C, they are not at issue here.

The plaintiffs in this case—who include several supermarket chains—brought this action in the district court to enjoin enforcement of the three-store limit. The complaint charged that this statutory restriction conflicted with the Sherman Act, 15 U.S.C. § 1, *et seq.*, because it would be a *per se* violation of the Sherman Act for private competitors to agree with each other to impose such

a limitation. The complaint further alleged that the defendants, the members of the Massachusetts Alcoholic Beverages Control Commission, lacked power to supervise, and did not in fact supervise, the anticompetitive consequences of this limitation (*i.e.*, less competition and higher prices).[1]

Several organizations moved to intervene to defend the statute. One of them, the Massachusetts Package Stores Association ("MPSA"), is a trade association primarily representing retail liquor stores. The other two organizations—The Wine & Spirits Wholesalers of Massachusetts and the Massachusetts Wholesalers of Malt Beverages—are trade associations for alcoholic beverage wholesalers in Massachusetts. All three entities sought to intervene as of right or, in the alternative, as permissive intervenors. Fed. R. Civ. P. 25(a)(2), (b)(2). The Commission and its members moved to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). After briefing and argument, the district court, on January 6, 1999, denied intervention to the trade associations but granted the defendants' motion to dismiss. *Massachusetts Food Ass'n* v. *Sullivan*, 184 F.R.D. 217, 228 (D. Mass. 1999).

The plaintiffs in the district court now appeal from the dismissal of their complaint. The trade associations that sought to intervene appeal from the denial of intervention (but in an amicus brief support the dismissal of the complaint). Our review of the judgment of dismissal is *de novo*. *Rogan* v. *Menino*, 175 F.3d 75, 77 (1st Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3274 (U.S. Oct. 14, 1999) (No. 99-646). Since we affirm the judgment of dismissal, the intervention issue is largely (al-

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[1] The complaint originally named the Commission itself as a defendant but, in response to an Eleventh Amendment objection, the members were substituted as defendants.

though not entirely) academic, and we return to it only after addressing the merits.

At first blush, one might think this is a strange complaint. The state statute limiting retail liquor outlets looks like a garden-variety act of local legislation limiting the number of licenses that the state will grant, and the statute neither authorizes nor directs private parties to engage in anticompetitive agreements among themselves. Putting aside the special status of state liquor regulation under the Twenty-First Amendment, U.S. Const. amend. XXI, § 2, one of the best settled rules in antitrust law is that the Sherman Act was not intended to "apply" to the states so as to foreclose otherwise valid state regulation. *Parker* v. *Brown*, 317 U.S. 341, 350-52 (1943); *see also Neo Gen Screening, Inc.* v. *New England Newborn Screening Program*, 187 F.3d 24, 28 (1st Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3263 (U.S. Oct. 8, 1999) (No. 99-617); *Tri-State Rubbish, Inc.* v. *Waste Management, Inc.*, 998 F.2d 1073, 1076 (1st Cir. 1993). But, as we shall see, there are qualifications on this general rule, and the case law is not entirely coherent. *See generally* I Areeda & Hovenkamp, *Antitrust Law* ¶ 221 (1997). With some ingenuity, the plaintiffs in this case have sought to make the most of the resulting ambiguities.

Almost from the outset, the immunity from the Sherman Act afforded to "state action" has been hedged by a concern with state laws deemed merely to authorize or direct conduct by private parties that—absent such state legislation—would violate the antitrust laws. *Cf. Parker*, 317 U.S. at 351-52. It is one thing to say that a state may itself regulate in an "anticompetitive" fashion; it is quite another to say that the state can effectively exempt *private* parties from obeying the antitrust laws. Thus, a

state cannot shield private parties from the federal antitrust laws by enacting a statute saying no more than that competing grocery stores may agree to fix prices; through the Supremacy Clause, the Sherman Act would preempt such a law.

This qualification is *itself* qualified. Under certain conditions, the states have been allowed to authorize or direct private conduct otherwise inconsistent with the Sherman Act. The main conditions are that the state do so as part of a deliberate policy to displace competition *and* that the state provide an alternative regime that provides "active supervision" of the conduct, *Patrick* v. *Burget*, 486 U.S. 94, 100 (1988); an example would be a specific authorization for joint ratemaking by intrastate carriers coupled with state agency authority to require that the resulting rates be just and reasonable. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48 (1985); *see* I Areeda, *supra*, ¶ 226.

What state entities can adopt such a policy (state executives? local municipalities?), how clearly the policy must be articulated, and (above all) what kind of supervision will suffice are among the issues that provoked endless litigation. *See* I Areeda, *supra*, ¶ 226. For example, supervision may be a proxy for competition, designed to protect consumers (*e.g.*, utility regulation); but supervision is not clearly limited to cases of this character. *See, e.g., Patrick*, 486 U.S. at 100-01 (suggesting that state supervision reinforces requirement that anticompetitive behavior at issue be consistent with the state's deliberate policy).

But our facts do not require an examination of clear articulation, active supervision or other conditions for immunity. It is only where state legislation "would otherwise" be preempted by the Sherman Act that these fur-

ther inquires are required. *Fisher* v. *City of Berkeley, California*, 475 U.S. 260, 265 (1986). In this case, the state has not ordered or authorized private parties to engage in conduct that, absent immunity, would even arguably violate the antitrust laws; there is no private agreement or arrangement between retailers as to the number of retail outlets and therefore no violation to be shielded. The state simply insists upon licensing retail liquor stores—as it does for many businesses or professions—and limits the number of licenses to three per owner.

Despite disclaimers, the plaintiffs' case rests in the end on the implicit proposition that the Massachusetts statute is preempted because it produces an *effect* that could not be produced by agreement of private parties without violating the antitrust laws. Admittedly, private parties could not agree that each of them would operate only three such outlets. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Addamax Corp.* v. *Open Software Found., Inc.*, 152 F.3d 48, 51 (1st Cir. 1998).[2] This resemblance in effects is the gist of the plaintiffs' position, although it is narrowed by the suggestion that preemption may be confined to statutes that produce the same effect as a *per se* violation (rather than a non-*per se* one); and, of course, plaintiffs concede that even a *per se* violation would be all right if the requisite state policy and active supervision existed.

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[2] *Topco* may no longer be good law for its broader proposition that such a restraint is condemned *per se* even where it is ancillary to a productive joint venture. *Cf. Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 20-24 (1979); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224-29 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). But no one doubts that an independent agreement between private parties to limit output or divide markets is to be condemned *per se*. *See Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

The difficulty with this "similar effects" argument is that much direct government regulation prohibiting one form of economic activity or requiring another involves directives that private parties could not themselves implement without violating the antitrust laws. For example, competing shoe stores could not agree on closing hours or holidays without committing *per se* violations of the antitrust laws; nor could competing taxi companies agree on the number of taxicabs to be operated; nor could cable companies agree that only one or two of them should serve a locality. Yet all of these results are examples of commonplace state or local regulation, sometimes accompanied by local price regulation but sometimes not.

To allow federal judges to decide which of these legislative enactments should survive and which should be condemned comes close to reintroducing the kind of judgments that got the Supreme Court into so much trouble in the *Lochner* era. The result might well be more competition and greater consumer welfare. But it would come at the cost of second-guessing the democratically elected legislature's decisions about the proper balance between competition and other social policies that are commonly reflected in such legislation. The Sherman Act is a "charter of economic liberty," *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958), but only as against *private* restraints.

From these examples, it is evident that one must be careful in parsing general statements to the effect that states may not compel "private parties to engage in anticompetitive behavior." *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 345-46 n.8 (1987). What is centrally forbidden is state licensing of arrangements between private parties that suppress competition—not state directives that *by themselves* limit or reduce competition. This is

the very distinction stressed by the Supreme Court in *Fisher* where it sustained the City of Berkeley's rent control ordinance (rent control being a classic constraint on competitive pricing). As the Court there explained,

> [a] restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.

Fisher, 475 U.S. at 267.

The only fact patterns that give the plaintiffs any purchase is a set of Supreme Court decisions that struck down state statutes that were deemed to direct and implement private conduct replicating resale price maintenance schemes.[3] The schemes were structured to allow one party (manufacturer or wholesaler) to set the resale price to be charged by purchasers at the next level. The resemblance in form and function to traditional private resale price maintenance, *see Dr. Miles Medical Co.* v. *John D. Park & Sons, Co.*, 220 U.S. 373 (1911), was so close that the Supreme Court treated the arrangements as if they were nothing other than private resale price maintenance schemes licensed and abetted by the state.

There are no private restraints in this case, whether operating alone or in conjunction with state action. *Cf. Duffy*, 479 U.S. at 345 n.8. The Massachusetts statute limiting licenses to three per company does not authorize

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[3] *Duffy*, 479 U.S. 335; *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

or direct any private agreements or permit any competitor to determine the price or location of another. The three-store limit is no more an agreement among competitors, or subordination of one competitor to the dictates of another, than a state electrical code that prescribes safety standards for contractors who wire buildings for electricity. As in *Fisher*, the restrictions have been "unilaterally imposed by government . . . to the exclusion of private control." *Fisher*, 475 U.S. at 266.

Our conclusion in no way depends on the premise that the Massachusetts three-store limit serves the public interest or on the amici's dubious suggestion that the limit has no effect on price or output.[4] Whatever its purported or actual purpose, *cf. Johnson* v. *Martignetti*, 375 N.E.2d 290, 297 (Mass. 1978), it is common knowledge that many statutes regulate private activities to protect the narrow economic interests of other companies, often to the detriment of the public. *See* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 23-24 (1983). But unless such a statute licenses or commands a *private* restraint, this is a matter for the voters and not for the federal courts—at least so far as the Sherman Act is concerned. Of course, such state statutes remain subject to the constraints of the Commerce Clause and other constitutional provisions.

This brings us to the separate question whether MPSA and the two wholesaler trade associations should have been allowed to intervene. The district court held that

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[4] In theory, the three-store limit might or might not affect price, depending on the extent of existing competition in specific local retail markets where (absent the limit) those who have three stores elsewhere in the Commonwealth might choose to operate. But energetic defense of the statute by MPSA is some indication that its members fear that more competition from larger chains would drive down price, improve service, or both.

the wholesalers' interests were too general and contingent to justify intervention; in the case of MPSA, whose members were subject to the very three-store regulation challenged by plaintiffs, the court said that its members did have a direct and concrete interest in defending the statute but that they were adequately represented by the Commonwealth. As for permissive intervention, the court found that all three trade associations could adequately express their views through amicus briefs.

The problem presented in this case is a common one: a private party attacks a regulatory statute or administrative rule; the state or its regulators are its defendants; and other parties having an economic interest in the validity or invalidity of the statute or regulation seek to intervene. The standard for intervention as of right is set forth in Rule 24(a)(2) as follows:

> Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or tranaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In such cases, the timeliness of interventon and the practical impact on the would-be intervenor are rarely in dispute: it is the "interest" and "adequately represented" criteria that are usually decisive.

Rule 24(a)(2)'s reference to "an interest relating to the property or transaction" suggests that the drafters had in mind something narrower and more akin to property or contract interests in conventional private litigation as the necessary stake; but this narrow reading has not been accepted in practice. *See Daggett* v. *Commission on Gov-*

ernmental Ethics and Election Practices, 172 F.3d 104, 110 (1st Cir. 1999). We will therefore assume that the district court was right in holding that MPSA satisfied the "interest" requirement and assume *arguendo* (and solely to shorten the opinion) that the district court was wrong in holding that the wholesalers lacked such an interest.

But, perhaps as a counterweight to the broad reading of "interest," the courts have been quite ready to presume that a government defendant will "adequately represent" the interests of all private defenders of the statute or regulation unless there is a showing to the contrary. *See Public Serv. Co.* v. *Patch*, 136 F.3d 197, 207 (1st Cir 1998). And while there are various ways to show that state representation is not adequate, the burden of overcoming the presumption is upon the would-be intervenor, *Daggett*, 172 F.3d at 111. The trial court, in applying a general rule to specific facts, is usually accorded a measure of deference in making the adequate-representation determination, so long as the court applies the proper legal standards.[5] *Id.* at 111-12.

The would-be intervenors argue that the Commonwealth cannot be an adequate representative of their interests while it also regulates them. In support of this position, they point to *Conservation Law Found.* v. *Mosbacher*, 966 F.2d 39 (1st Cir. 1992), and the district court opinion in *Patch*, 173 F.R.D. 17 (D.N.H. 1997). In *Mosbacher*, we held that commercial fishing groups could intervene as of right to oppose a challenge to a state

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[5] In *Daggett* we were concerned that the district court might possibly have been misled by our own language in *Moosehead Sanitary Dist.* v. *S.G. Phillips Corp.* 610 F.2d 49, 54 (1st Cir. 1979), suggesting that only a limited number of "cubbyholes" existed for claims of inadequate representation. *See Daggett*, 172 F.3d at 113. In the present case, while the district court's decision cites *Moosehead*, it also makes clear that the court did not impose any artificial limitation on the way in which parties may show inadequate representation. *Massachusetts Food Ass'n*, 184 F.R.D. at 222-23.

agency's approval of a fishery plan, noting that the fishing groups were regulated by the agency. *Mosbacher*, 966 F.2d at 44. In *Patch*, the district court allowed intervention by several electric utilities who were largely aligned with state regulators in defending a major state reform plan that restructured retail power regulation in the state. *Patch*, 173 F.R.D. at 27-28. From these decisions, MPSA infers a general rule that the state defendant's representation is inadequate as a matter of course whenever it is also the *regulator* of the entity that seeks to intervene.

The cases do not support such a *per se* rule. We certainly did not adopt such a rule in *Mosbacher*, where the intervenors overcame the presumption of adequate representation by the government defendant because, *inter alia*, the agency had not filed an answer to the complaint but had instead accepted a consent decree providing for virtually all the relief sought and subjecting the fishing groups to more stringent rules than had previously been in effect. *Id.* at 44. It is not clear whether the district court was applying a *per se* rule in *Patch*; but in any event that part of its decision was not appealed to us.

Here, there is no doubt that the Commonwealth was zealously interested in upholding the validity of the statute. The only difference between it and the would-be intervenors was their interest in offering *other* legal arguments (for example, based on the Twenty-First Amendment) to sustain the statute. But these arguments were easily presented in amicus briefs. This is not a case where the complaint was framed so as to require an evidentiary determination and where the would-be intervenors had information that could only be presented by their participation as parties. *See generally Daggett*, 172 F.3d at 112.

The would-be intervenors point out that an amicus does not enjoy the same opportunities as a full-fledged

litigant even to offer legal argument; for example, in this court, amicus briefs are shorter than regular briefs and oral argument is at the court's discretion. Fed. R. App. P. 29(d), (g). But a court is usually delighted to hear additional arguments from able amici that will help the court toward right answers, and the amici can easily seek a larger allotment of pages or time to participate in oral argument. *See id.*

The more interesting claim is that the Commonwealth might refuse to appeal if it lost; or—if it won and plaintiffs sought *certiorari*—the Supreme Court might limit the questions to be considered to those set forth in the *certiorari* petition. But amici, like respondents, can advise the Supreme Court of missing arguments. *Davis* v. *United States*, 512 U.S. 452, 457 n.* (1994) (citing *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality opinion)). And if the Commonwealth refused to appeal from a defeat, a would-be intervenor could then seek to intervene. 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1909, at 345 & n.38 (1986); *see also Daggett*, 172 F.3d at 112.

As for permissive intervention, the would-be intervenors likely met the low threshold set by Rule 24(b)—that their defenses included questions of law common to the defenses offered by the state. Fed. R. Civ. P. 24(b). But even where this necessary condition is present, the rule merely permits intervention at the discretion of the district court. *Daggett*, 172 F.3d at 112-13. The district court reasonably concluded that the Commonwealth was adequately representing the interests of everyone concerned to defend the statute and that any variations of legal argument could adequately be presented in amicus briefs. We see no abuse of discretion in this ruling.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 98-11175-DPW

MASSACHUSETTS FOOD ASSOCIATION, ROCHE BROS. SUPERMARKETS, INC., THE STOP & SHOP SUPERMARKET COMPANY, PACKAGING CENTER, INC., BJ'S WHOLESALE CLUB, INC., MORMAX CORPORATION, THE EDWIN R. SAGE COMPANY, INC., TRADER JOE'S CO. AND TRADER JOE'S EAST, INC.,

Plaintiffs,

v.

WALTER J. SULLIVAN, CHAIRMAN, AND SUZANNE IANNELLA AND FREDERICK W. RILEY, INDIVIDUALLY IN THEIR REPRESENTATIVE AND OFFICIAL CAPACITIES AS MEMBERS OF THE MASSACHUSETTS ALCOHOLIC BEVERAGES CONTROL COMMISSION,

Defendants.

MEMORANDUM AND ORDER
January 6, 1999

The Massachusetts Food Association and several retail chains have brought this suit against the members of the Massachusetts Alcoholic Beverages Control Commission challenging the legality and constitutionality of a portion of Mass. Gen. Laws ch. 138, § 15. The plaintiffs assert that section 15's directive restricting to three the number of retail liquor licenses that any one individual or entity can possess in Massachusetts violates the federal Sherman

Antitrust Act and therefore is invalid under the Supremacy Clause of the United States Constitution. The defendants have moved to dismiss for failure to state a claim upon which relief can be granted, principally because § 15 represents unilateral state action beyond the reach of the federal antitrust laws. Meanwhile, the Wine & Spirit Wholesalers of Massachusetts, Inc., Massachusetts Wholesalers of Malt Beverages, Inc., and Massachusetts Package Stores Association have all moved to intervene in the case as defendants. The intervenors seek to press a broader range of issues at the motion to dismiss state. I will deny the motions to intervene, but will grant the defendants' motion to dismiss.

I. THE LITIGANTS

A. *The Plaintiffs*

The Massachusetts Food Association is a private trade association whose membership includes multi-outlet food retailers operating in Massachusetts. The remaining plaintiffs are corporations owning chains of retail stores in Massachuetts. Each corporation owns more than three stores in the Commonwealth but is restricted to only three liquor licenses. Roche Bros. Supermarkets, Inc., a Massachuetts corporation, operates 13 supermarkets in Massachusetts. The Edwin R. Sage Company, Inc., a Massachusetts corporation, operates six retail outlets in Massachusetts. The Stop & Shop Supermarket Company, a Delaware corporation, and its wholly-owned subsidiary, Packaging Center, Inc., a Massachusetts corporation, operate 93 supermarkets in Massachusetts. BJ's Wholesale Club, Inc., a Delaware corporation, and its wholly-owned subsidiary, Mormax Corporation, a Massachusetts corporation, operate 13 retail outlets in Massachusetts. Trader Joe's Co., a California corporation, and its wholly-owned subsidiary, Trader Joe's East, Inc., a

Massachusetts corporation, operate six retail outlets in Massachusetts. For the latter three sets of plaintiffs, the parent company and subsidiary are restricted to a combined total of three retail liquor licenses in Massachusetts.

B. *The Defendants*

The defendants are the individual members of the Massachusetts Alcoholic Beverages Control Commission (hereinafter "the Commission"), sued only in their representative and official capacities.[1] The Commission, a state agency created by Mass. Gen. Laws ch. 6, § 43, supervises "the conduct of the business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages." Mass. Gen. Laws ch. 6, § 44. The Commission submits each year "recommendations for such legislation as it deems necessary or desirable for the better regulation and control of such traffic [of alcoholic beverages] and for the promotion of temperance in use of such beverages." *Id.*

C. *The Proposed Intervenors*

Two separate groups have moved to intervene as defendants in this action. The first group, Massachusetts Package Stores Association (hereinafter "MassPack"), is a trade association composed primarily of individual retail package stores. MassPack represents these retail stores "on legislative and regulatory matters, especially those relating to control of the sale of alcohol and the maintenance of public welfare and safety." (Mem. of Law in Supp. of Mass. Package Stores Ass'n Mot. to Intervene as of Right at 2.) One retail liquor store actually owned

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1 The plaintiffs originally sued only the Commission itself, but amended the complaint after defendants filed a motion to dismiss on Eleventh Amendment grounds.

by plaintiff The Stop & Shop Companies, Inc. is a member of the putative defendant intervenor, MassPack.

The second group consists of Wine & Spirits Wholesalers of Massachusetts, Inc. and Massachusetts Wholesalers of Malt Beverages, Inc. (hereinafter, collectively "the Wholesalers"). These two organizations are trade associations for wholesalers of alcoholic beverages operating in the Commonwealth. Wholesalers must be licensed by the state under Mass. Gen. Laws ch. 138, § 18. Retailers licensed under § 15 may only buy alcohol from wholesalers licensed under § 18. Mass. Gen. Laws ch. 138, § 18.

II. THE MOTIONS TO INTERVENE

At the outset, I must address the roles of MassPack and the Wholesalers in this litigaton. MassPack and the Wholesalers have each moved to intervene as of right under Fed. R. Civ. P. 24(a)(2). In the alternative, should I decide they are not entitled to intervene as of right, they request permissive intervention under Fed. R. Civ. P. 24(b)(2).

A. *Intervention as of Right*

Rule 24(a) provides that:

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The First Circuit has set out a four-part test for intervention as of right under Fed. R. Civ. P. 24(a)(2): (a) the application must be timely; (b) the applicant must have an interest relating to the property or transaction which is the basis of the action; (c) the applicant must be so situated that the disposition of the action may set up a practical impediment to its ability to protect that interest; (d) the applicant must show that existing parties do not adequately represent its interests. *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998); *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989).

In this case, the plaintiffs, who object to the applicants' motions to intervene, do not dispute the timeliness of the applications, nor do they present any serious opposition to the proposition that the applicants' own ability to protect any interests they may have will likely be impaired by this action. As a result, I will focus on whether the proposed intervenors have sufficient interests in the case to justify intervention and whether any such interests are adequately represented by the existing defendants.

1. Interests

While there is no definitive statement of what type of interest is required to justify intervention as of right, the First Circuit has said that "the intervenor's claim must bear a 'sufficiently close relationship' to the dispute between the original litigants," and "[t]he interest must be direct, not contingent." *Dingwell*, 884 F.2d at 638 (citations omitted). The interest must also be "significantly protectable." *Patch*, 136 F.3d at 205 (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)).

The proposed intervenors in this case claim essentially economic interests. The First Circuit in *Conservation*

Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39, 43-44 (1st Cir. 1992), held that the economic interests of fishermen were sufficient to justify intervention in a suit by environmental advocacy groups against officers of a federal agency proposing to enter into a consent decree concerning regulation of the fishing industry. The court reasoned that altering the regulations would change the economic circumstances of the fishing groups, and "[t]hese interests are not speculative simply because the explicit terms of the consent decree do not implement those changes, but merely begin a process through which they would come about." *Id.* at 43. As a result, a group may have interests sufficient to intervene in a suit concerning regulations which directly affect the group economically even if the regulations do not explicitly refer to that group. *See also New York Pub. Interest Research Group, Inc. v. Regents of Univ. of State of New York*, 516 F.2d 350, 351-52 (2d Cir. 1975) (pharmacists' association had a sufficient interest to intervene in a suit by consumers to enjoin university regents from enforcing a state regulation prohibiting advertisement of prices of prescription drugs).

However, the First Circuit has more recently cautioned that, while potential economic harm is an important factor in determining whether there is a sufficient interest, "[i]t is settled beyond peradventure . . . that an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *Patch*, 136 F.3d at 205. In *Patch*, consumer groups sought to intervene in an action by utility companies against the state public utilities commissioners, asserting that the disposition of the case challenging the commission's plan would affect consumers' utility rates. The court found that an interest in lower utility rates was too general to be the basis

for intervention, because it was an interest common to every consumer and business in the state. *Id.* The court also found this interest to be overly contingent, because "numerous market variables will impact New Hampshire electric rates even after the PUC implements a restructuring plan," and "[w]hether interaction of these variables actually will produce lower rates is anybody's guess." *Id.* at 205-06.[2]

Applying First Circuit teachings to this case, I find that the Wholesalers have not set out an interest sufficient to justify intervention as of right. The Wholesalers assert that Mass. Gen. Laws ch. 138, § 15 is part of a comprehensive scheme regulating the sale of liquor in the commonwealth. They argue that because this scheme authorizes retailers to buy liquor only from authorized wholesalers, a change in the regulation of retailers will affect the Wholesalers economically.[3] The Wholesalers

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[2] It bears noting that the district court in *Patch* permitted several utility companies not in the suit originally to intervene because the changes in the state's utility plan at issue in the case would directly affect their business. *Public Serv. Co. of New Hampshire v. Patch*, 173 F.R.D. 17, 27 (D.N.H. 1997), *aff'd*, 136 F.3d 197 (1st Cir. 1998). The First Circuit did not address these rulings in affirming the district court's denial of intervention to the consumer groups and other parties.

[3] The Wholesalers' argument that, if this court rules for the plaintiffs, it would have to strike all of § 15, rather than just the three license limit, is both incorrect and irrelevant to this discussion. As Judge Wolf recently observed, state law governs the severability of a state statute, and under Massachusetts law, if a court finds a part of a statute to be unconstitutional, the court should find the remainder of the statute constitutional and valid as far as possible if the remaining parts are severable. *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 147 (D. Mass. 1998). Here, the remainder of § 15 is clearly severable. Furthermore, even if all of § 15 were to be struck, the Wholesalers would still not have a sufficient interest because no part of the section is directly relevant to the Wholesalers' businesses.

further speculate that § 15 helps to maintain an orderly market, and disruption of this order will disrupt their businesses and will undermine the promotion of temperance in the interest of public health and safety. Any speculative interest that the Wholesalers have in public health and safety in this connection is, however, identical to the interests of the Commonwealth, and therefore, under *Patch*, not sufficient. The Wholesalers' remaining interests are all essentially economic in nature.[4]

The Wholealers' economic interests in this case are simply too general and too contingent to be sufficient. To be sure, the Wholesalers' interests are not quite as general as those of the consumer groups in *Patch* which were shared by all consumers of electricity in the state. Nonetheless, § 15 does not address the Wholesalers at all; it merely affects a broad market in which they play a separate part. The Wholesalers will not necessarily be more directly affected by the outcome of this case than anyone else involved in liquor production and sales in Massachusetts, potentially including consumers. Allowing anyone to intervene in this or any other case who in some sense may be affected by a change in the challenged statute—regardless of whether the party is in fact directly regulated by the statute at issue—is not a manageable way to organize litigation.

In addition, the Wholesalers' interests are entirely contingent. The effect on their businesses of a change in the nature and number of retailers in the Commonwealth "is

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[4] The Wholesalers' reply memorandum simply elaborates on their asserted economic interests in the case, premised on the fact that eliminating the three license limit on retailers would have industry-wide effects. Their claim that such a change could endanger family-owned businesses which have benefitted the community in civic and charitable ways (*Id.* at 5) is simply another—and quite conjectural—way of stating a potential economic harm.

anybody's guess." *Patch*, 136 F.3d at 206. Perhaps wholesalers would benefit from more competition at the retail level or see no effect on their businesses at all. The Wholesalers have not identified anything beyond a general interest in a case touching on the broadly defined commercial setting in which they participate.

MassPack asserts interests that are more direct. Specifically, § 15 regulates retailers of liquor, including the members of MassPack. Elimination of § 15's three license limit will affect MassPack members themselves, potentially enabling them to get licenses for more than three stores, and, more importantly for them, may change the number and nature of their competitors. MassPack's interest in this case is not a general one; the regulation in question governs its members directly, and their interests are different from those of the general public or of any business outside of the liquor retail sector. Indeed, "preserving the right of small, independent liquor dealers to do business" is one of the recognized purposes of the three license restriction. *Johnson v. Martigneti*, 374 Mass. 784, 792 (1978).

The plaintiffs' contention that MassPack's interest is not protectable because it is anticompetitive does not affect intervention analysis. MassPack is not seeking protection under the antitrust laws, which, as the plaintiffs assert, cannot be used for anticompetitive purposes. Rather, MassPack is seeking to preserve a state regulatory statute which it claims benefits its members and which may in part be intended to benefit its members. The plaintiffs are essentially inviting me to presume that § 15 violates antitrust principles for the purposes of this motion to intervene. I make no such presumption at this time.

Even though § 15 regulates retailers directly, it is not immediately clear whether the economic interest Mass-

Pack's member retailers have in this case is direct or contingent. The plaintiffs argue that the economic effect of a rejection of the three license limit on MassPack members, like that on the Wholesalers, "is anybody's guess." *Patch*, 136 F.3d at 206. MassPack members could potentially even benefit from such a change, setting up additional retail stores themselves. More likely, however, the entry of more and larger competitors into the retail liquor market will have a negative economic effect on some small retail operations. The interest in economic security seems direct and concrete enough to find that MassPack has a sufficient interest in the case for intervention purposes.

2. Adequate Representation

By contrast, I find that MassPack's interests are adequately represented by the Commonwealth in this case.[5] Of course, "[a]n intervenor need only show that representation may be inadequate, not that it is inadequate." *Mosbacher*, 966 F.2d at 44; *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). However, while an applicant for intervention "need only make a minimal showing" of inadequacy, "the adequacy of interest requirement is more than a paper tiger. A party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy." *Patch*, 136 F.3d at 207.

The applicants for intervention in this case run up against two basic presumptions of adequate representation. The First Circuit in *Patch* held that commissioners de-

[5] Even if the Wholesalers did have a sufficient interest to justify intervention as of right, I would deny them intervention as of right because their interests are also adequately represented by the Commonwealth. The same reasoning I use in discussing this issue in relation to MassPack applies equally to the Wholesalers.

fending an action in their capacity as members of a representative governmental body are presumed to represent the interests of their constituents adequately. *Id.* This presumption applies in the current case as well, because the defendants are commissioners appointed by the governor and here sued in their representative capacity. To rebut this presumption "requires 'a strong affirmative showing' that the agency (or its members) is not fairly representing the applicant's interests." *Id.* (citation omitted). More generally, "[w]here the party seeking to intervene has the same ultimate goal as a party already in the suit, courts have applied a presumption of adequate representation." *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). Here, the proposed intervenors and the original defendants have precisely the same goal—defending the validity of the three license limit on retailers of liquor.

To overcome this latter presumption, an applicant for intervention traditionally had to show "adversity of interest, collusion, or nonfeasance." *Id.* The First Circuit has also recognized that evidence that the original parties are "sleeping on their oars" or are engaged in settlement talks may be enough to show inadequate representation. *Mosbacher*, 966 F.2d at 44; *Moosehead*, 610 F.2d at 54-55.

The applicants for intervention have some basis for arguing that they overcome these presumptions. MassPack's members are retailers specifically regulated by the Massachusetts Alcoholic Beverages Control Commission. (The Wholesalers are similarly regulated by the Commission, albeit not under § 15.) The district court in *Patch* held that a regulatory commission and the subjects of its regulation are in "a traditionally adversarial relationship" sufficient to overcome the presumption of adequacy. *Pub-*

lic Serv. Co. of New Hampshire v. Patch, 173 F.R.D. 17, 28 (D.N.H. 1997), *aff'd*, 136 F.3d 17 (1st Cir. 1998).[6] Several other courts have reached a similar conclusion, contending, as the applicants for intervention do here, that a governmental agency's need to represent the public interest conflicts with its representation of members of the industry it regulates. *See Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Department of the Interior*, 100 F.3d 837, 845 (10th Cir. 1996); *NYNEX Corp. v. Federal Communications Comm'n*, 153 F.R.D. 1, 3 (D. Me. 1994).

First Circuit precedent, however, suggests that this potential divergence of interests by itself is insufficient to overcome the dual presumption of adequate representation present in this case. In *Patch*, the First Circuit found that the applicants for intervention had suggested no legal arguments that the government agency could not or would not make. *Patch*, 136 F.3d at 208. Further, the *Patch*, court noted that the governmental defendants in that case had "launched a full-scale uncompromising defense." *Id.* Here, also, the defendants have launched a vigorous defense, including two motions to dismiss as the outset. The defendants appear to be willing and able to present all defenses that the proposed intervenors could advance.[7] "This circumstance, in itself, weighs heavily in

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[6] The district court made this statement in the course of its decision to allow several utility companies to intervene. Because the grant of intervention rights to those parties was not appealed, the First Circuit did not address this issue.

[7] To be sure, there are apparent in the submisssions of the defendants and those of the proposed intervenors differences of emphasiss presumably as a result of somewhat different views regarding the issues to be pressed at the motion to dismiss stage. The defendants—unlike the Wholesalers who offer a full argument—treat the 21st Amendment question only in a footnote and do not treat at length, as the Wholesalers do, the question of whether

favor of denying mandatory intervention." *Id.; accord International Bhd. of Teamsters v. J.F. Partyka & Son, Inc.*, 176 F.R.D. 429, 432 (D. Mass. 1997) (finding that the fact that a union has energetically pursued the grievance in question supports a finding of adequate representation).

Indeed, as Judge Keeton has observed, the First Circuit generally finds inadequate representation by a governmental agency only when that agency fails to pursue a case wholeheartedly or when its interests diverge in fact from the proposed intervenors' interests. *Resolution Trust Corp. v. City of Boston*, 150 F.R.D. 449, 454 (D. Mass. 1993); *see Mosbacher*, 966 F.2d at 44 (inadequate representation found where governmental defendant did not file an answer to the complaint, instead signing a consent decree agreeing to most of the relief sought); *Moosehead*, 610 F.2d at 49 (adequate representation found when sanitary district's attorneys were not "sleeping on their oars"). Where, as here, the original defendants have defended the case vigorously, "a logical possibility of divergence, without any indication of actual divergence, does not suffice for the purposes of intervention of right." *Resolution Trust Corp.*, 150 F.R.D. at 454.

The First Circuit, in looking at adequacy of representation, considers three additional factors: (1) whether the interests of the present party are sufficiently similar to the

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ownership limitations constitute a per se antitrust violation; nor do the defendants argue separately and extensively, as both the wholesalers and MassPack do, the question of *Parker v. Brown* immunity. As my disposition of the motion to dismiss suggests, the choice by the defendants of issues to present at the motion to dismiss stage appears sound. The additional arguments the proposed intervenors pressed at this stage appear more appropriate for consideration after some factfinding, if that were necessary.

applicants' interests that the present party will definitely make the applicants' legal arguments, (2) whether the present party is willing and able to make those arguments, and (3) whether the applicants, if allowed to intervene, would add some necessary element to the case. *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 145 (1st Cir. 1982).

Here, the applicants for intervention point to very little of significance that they can add to this case. MassPack argues that it will bring the perspective of its members, who have a potential economic stake in the continuation of the three license limit, which is different from the public interest-oriented perspective that the Commission members will bring. However, the issues in this case are almost exclusively legal issues to be decided based on judicial construction of statutes and the constitution; different sets of facts or different perspectives on the part of the litigants will change little in the arguments before the court. The proposed intervenors, particularly the Wholesalers, also question the brevity of the original defendants' treatment of certain legal issues and their failure to mention certain important cases in their memorandum supporting their motion to dismiss. However, where the Commission members are aggressively pursuing their defense in general and at this stage appear to have at least identified the potential defenses, *see* note 7 *supra*, I will not find that strategic differences, different uses of caselaw or a welcome consciseness in presentation to be grounds for a finding of inadequate representation.[8]

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[8] The Wholesalers also point out that when another liquor regulation was recently struck down in *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp.2d 41 (D. Mass. 1998), the Attorney General declined to appeal the decision. The case went on to the First Circuit only because the Wholesalers, who had intervened as defendants, appealed. The First Circuit, however, decided that the Whole-

Overall, it appears that MassPack must rely on the inherent adversity between regulators and those they regulate as its basis for a finding of inadequate representation. Because that adversity appears to have little relevance to the argument of this case and because of the First Circuit's strong presumptions of adequate representation when parties have the same ultimate goal and when a governmental organization is the existing party, I find that neither MassPack nor the Wholesalers has established that the named defendants will inadequately represent its interests. As a result, I conclude neither MassPack nor the Wholesalers is entitled to intervention as of right.

B. Permissive Intervention

Both MassPack and the Wholesalers ask that they be permitted to intervene pursuant to Fed. R. Civ. P 24(b)(2) in the event that they are denied intervention as of right. Fed. R. Civ. P. 24(b) states in relevant part:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

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salers lacked standing to bring an appeal. *Sea Shore Corp. v. Sullivan*, 158 F.3d 51 (1st Cir. 1998). The court concluded that where a defendant "intervenor does not receive a direct benefit from a reversal of the decision below, it is not 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* at 58 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It is by no means clear that the Wholesalers could make any more substantial standing here if I were to rule for the plaintiffs.

District courts have "broad discretion" in deciding whether or not to grant permissive intervention under Fed. R. Civ. P 24(b)(2). *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 641 (1st Cir. 1989). The First Circuit has pointed to three factors that can make permissive intervention appropriate, two of which come directly from the statute: "(1) 'the applicant's claim or defense and the main action have a question of law or fact in common;' (2) the applicant's interests are not adequately represented by an existing party; and (3) intervention would not result in undue delay or prejudice to the original parties." *In re Thompson*, 965 F.2d 1136, 1142 n.10 (1st Cir. 1992).

Here, the applicants wish to present essentially the same defense as the existing defendants, so they clearly fulfill the first prong of this test. However, as explained at length above, the applicants have not shown that the Commission members do not adequately represent their interests. This failure diminishes the case for permissive intervention.

As discussed above, MassPack and the Wholehalers would add very little to this case. This is not a fact-based dispute, so different facts, opinions and perspectives are of relatively limited assistance to the court. Similarly, the applicants for intervention do not appear to have different legal arguments. They would simply provide new case citations and would make the different strategic choice of raising the 21st Amendment issue now, rather than noting it and reserving it for the future, as the existing defendants have. MassPack and the Wholesalers have "presented no creditable argument that [their] status as [] intervenor-defendant[s] would in any way reshape the issues in this case or contribute to its just resolution." *Resolution Trust Corp.*, 150 F.R.D. at 455.

And despite their protestations to the contrary, MassPack and the Wholesalers would, if brought into this lawsuit, inevitably increase the demands of case management for the court and the other parties. I conclude that they would contribute little more to this case than alternatively phrased legal arguments. This they can do through their present role as amici curiae. Because they have "not shown any justification for the delay and added demands on resources of the court and the parties that [their] intervention would be likely to cause," *id.*, I will exercise my discretion and deny the applicants' requests for permission to intervene.

III. THE MOTION TO DISMISS

In reviewing a motion to dismiss, I "must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiffs." *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (citing *Monahan v. Dorchester Counseling Ctr.*, 961 F.2d 987, 88 (1st Cir. 1992)). However, I "will not accept a plaintiff's unsupported conclusions or interpretations of law." *Carreiro v. Rhodes Gill & Co.*, 68 F.3d 1443, 1446 (1st Cir. 1995). Furthermore, I may grant dismissal only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Roeder v. Alpha Indus.*, 814 F.2d 22, 25 (1st Cir. 1987) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Applying this standard, I address only two legal issues: whether the allegation that Mass. Gen. Laws ch. 138, § 15 sets out a per se vioation of the antitrust law is sufficient and whether, even if § 15 involves a per se antitrust violation, the statute constitutes unilateral state action beyond the reach of the federal antitrust laws. Because after consideration of these two issues I find dismissal is

appropriate, I need not reach the two additional grounds for dismissal argued at greater length by the proposed intervenors, whom I treat as amici curiae: whether the challenged restriction qaulifies for state action immunity and whether the Twenty-first Amendment protects the statute even if it violates federal antitrust law.

A. Does § 15 Establish a Per Se Antitrust Violation?

The plaintiff specifically challenges the portion of Mass. Gen. Laws ch. 138, § 15 which provides with reference to liquor retail licenses, "No person, firm, corporation, association, or other combination of persons . . . shall be granted, in the aggregate, more than three such licenses in the commonwealth." They assert that this restriction facially conflicts with the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, and is therefore preempted under the Supremacy Clause of the United States Constitution.

The Supreme Court has held that:

> a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation.

Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982). A statute's adverse effect on competition is not enough to trigger preemption; indeed, the states would be crippled in their efforts to engage in any economic regulation if it were. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978).

The defendants have suggested that the conduct mandated by § 15 might not constitute a per se violation even if engaged in by agreement of private parties, but they do not press this as a grounds for dismissal.[9] Nonetheless, I will briefly consider whether the allegation that § 15 constitutes a per se violation of the antitrust laws such that it may be subject to preemption.

Per se violations are those that "are so 'plainly anticompetitive' and so often 'lack . . . any redeeming virtue' that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases." *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (internal citations omitted). They are agreements which "so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances," *Nynex Corp. v. Discon, Inc.*, 119 S. Ct. 493, 497 (1998). In general, "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations." *Broadcast Music*, 441 U.S. at 9 (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972)).

Plaintiffs argue that § 15 is an output restriction, fitting it into a common category of per se violation. In *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984), the Supreme Court found that the NCAA's restriction on the number of football games member universities could televise "create[d] a limitation on output; our cases have held that such limitations are unreasonable restraints of trade." *Id.* at 99. At first blush, § 15's restriction on the number of retail liquor

[9] As noted, the wholesaler amici press this point more forcefully.

licenses a company may possess appears to have characteristics similar to the NCAA's restriction on the number of football games schools may televise and to other output restrictions found to be per se violations of the Sherman Act.

However, § 15 is not a traditional limitation on output. In restricting the number of retail stores any individual or company may own, Massachusetts is not necessarily limiting the total number of liquor retail stores or the total amount of liquor sold in the Commonwealth. It may be viewed as simply spreading this output among more retailers. Furthermore, since a restriction on the number of stores an individual entity may own is different from traditional output restrictions which directly limit the amount of a product that individuals may sell, it is by no means clear that the three license ownership limit fits into a category of restriction about which courts have "considerable expertise" and so can classify as a per se violation. Nor is it clear that the statute places irresistible pressure on private parties to violate the antitrust laws.

Nonetheless, at this stage, I find that the plaintiffs' pleadings establish a sufficient possibility of a per se violation to survive a motion to dismiss. Section 15 may in fact have the effect of limiting output in a way that would necessarily be impermissible under the Sherman Act if engaged in by private parties. Without further factual development, it is difficult not to characterize § 15's three license ownership limit as a practice which "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music*, 441 U.S. at 19-20. Certainly, the intent of § 15 is to dampen output by regulating sales and encouraging temperance:

> Concentration of retailing in the hands of an economically powerful few has been thought to intensify the

> dangers of liquor sales stimulations, thereby threatening trade stability and promotion of temperance. Regulation of the number of licenses issued, therefore, aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; avoiding practices such as indiscriminate price cutting and excessive advertising; and preserving the right of small, independent liquor dealers to do business.

Johnson v. Martignetti, 374 Mass. 784, 792 (1978). As a result, I would not deprive the plaintiffs solely on these pleadings the chance to develop a record supporting the proposition that the three license limit is a per se violation which is plainly anticompetitive and lacks redeeming virtue.

B. Does § 15 Constitute Unilateral State Action Immune from the Antitrust Laws?

Although I will accept at this stage the proposition that the plaintiffs have adequately pled that the three license restriction would have constituted a per se violation if it had been the product of private concerted action, defendants may still prevail if § 15 constitutes unilateral state action. The federal antitrust laws do not apply to unilateral state action, so plaintiffs have not presented a colorable claim, and the action must be dismissed.

Section 1 of the Sherman Act "reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is "wholly unilateral.' " *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968)). In *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), the Supreme Court applied this principal to a municipal rent control ordinance, holding that laws uni-

laterally imposed by the government are outside of the Sherman Act and so cannot be in impermissible conflict with it. *Id.* at 266-67. The Court further held that the fact that property owners obeyed the statute did not create a combination or conspiracy between the city and the property owners or among the property owners. *Id.* at 267. Thus, the fact that retailers in Massachusetts obey the three license limit set out by § 15 does not create a conspiracy.

To be sure, the Court in *Fisher* found that some government-imposed restraints do not constitute unilateral action outside the scope of § 1 of the Sherman Act. These the Court characterized as "hybrid" restraints. *Id.* at 267-68. Under a hybrid restraint, "nonmarket mechanisms merely enforce private marketing decisions," such that "private actors are thus granted 'a degree of private regulatory power.'" *Id.* at 268 (citation omitted). *Fisher* referenced two previous cases in which the Supreme Court had invalidated statutes because they constituted hybrid restraints. Examination of those and related cases is useful in determining whether § 15 is a hybrid restraint.

In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), the Court struck down as contrary to the Sherman Act a Louisiana law which allowed liquor distributors and retailers to make contracts fixing retail prices and then prevented any retailer, whether or not a party to the contract, from selling at less than the prices stipulated in such a contract. *Id.* at 386-90. Similarly, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court invalidated a regulation which provided that wine prices posted by a single wholesaler would be binding upon all wholesalers within a designated trading area. *Id.* at 99-100, 103. In both of these cases, the contested statute gave a private party the power to set prices which the state then enforced

as to that party and others. It was this private regulatory power that made these statutes impermissible hybrid restraints.

Judge Wolf recently found that a Massachusetts statute that allowed wine wholesalers to set prices and then held them to those prices for a month without any review by the state as to the reasonableness of the price constituted just such a hybrid restraint in violation of the Sherman Act. *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp.2d 41, 45-46 (D. Mass. 1998), *appeal dismissed sub nom. Sea Shore Corp. v. Sullivan*, 158 F.3d 51 (1st Cir. 1998). *See also Miller v. Hedlund*, 813 F.2d 1344, 1351 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988) (invalidating as hybrid a similar Oregon statute).

The restriction challenged here, however, is quite different. It does not cede price setting power to private parties without state review. Section 15 gives private retailers no discretion as to the maximum number of retail licenses they may obtain. Instead, the statute unilaterally sets the limit on liquor retail licenses at three. The retailers governed by this limit may properly do nothing but obey it. Section 15 resembles the ordinance in *Fisher*, which dictated the specific rent ceilings property owners must follow. *Fisher*, 475 U.S. at 269. As in *Fisher*, the contested statute here lacks the requisite concerted action to trigger § 1 of the Sherman Act.

Plaintiffs argue that § 15 is in fact a hybrid regulation because it restricts one element of competition, while giving retailers discretion to determine the location, size and output of their retail stores. I find, however, that any discretion as to the size and nature of retail stores is wholly collateral to § 15's three license ownership limit.[10]

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[10] Defendants vigorously contest this assertion, pointing to numerous statutory controls as to the number and nature of liquor re-

Plaintiffs have not challenged regulations governing the location, size or output of retail stores; they have only challenged the limit on the number of licenses an individual can hold. As to that limit, retailers have no discretion. This places § 15 in similar posture as the ordinance in *Fisher*, which set limits on the rent landlords could charge but left to the landlords' discretion the location and nature of the property they could rent out.[11]

Applying *Fisher* and comparing § 15 to the statutes struck down in *Midcal* and *Schwegmann*, I find the contested portion of § 15 to be unilateral state action outside the scope of § 1 of the Sherman Act. Because § 15 has survived the "first level preemption inquiry of *Rice*," I need not explore the next sequential level: whether *Parker v. Brown*, 317 U.S. 341 (1943), state action immunity is available to defend the statute. *See generally*, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 217c, at 315 (rev. ed. 1997).

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tail stores. I need not address this dispute because the provision challenged here, irrespective of residual discretion as to collateral questions of location, size and output, is unilateral state action simpliciter.

[11] The plaintiffs look to *Hertz Corp. v. City of New York*, 1 F.3d 121 (2d Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994) for support. In *Hertz*, a rental car company challenged a city statute which prohibited rental car companies from charging differential fees based on a customer's residence. *Id.* at 124. The Second Circuit found New York City's law to be a hybrid restraint in violation of the Sherman Act "because it removes one element of competition in car-rental pricing, but does not further regulate or review the prices set by rental companies."

I find the reference to *Hertz* unpersuasive. As a leading commentary on antitrust law observes, "The ordinance in *Hertz* did not give any private actor the discretion to impose any kind of restraint at all; as a result, its analysis is fundamentally inconsistent with [governing Supreme Court precedent]." 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217c, at 319 (rev. ed. 1997).

V. CONCLUSION

For the reasons set forth more fully above, the motions of MassPack and the Wholesalers to intervene as defendants are DENIED, and the motion of the defendants to dismiss for failure to state a claim is GRANTED.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 98-11175-DPW

MASS. FOOD ASSOCIATION, *et al.*,
Plaintiffs,

v.

MASS. ABCC,
Defendants.

ORDER OF DISMISSAL

WOODLOCK, District Judge

In accordance with this Court's Memorandum and Order issued January 6, 1999, is hereby ORDERED that the above-entitled action be and hereby is DISMISSED.

BY THE COURT,

/s/ Michelle Rynne
Deputy Clerk

Dated: January 7, 1999

Supreme Court, U.S.
FILED
MAR 30 2000
CLERK

No. 99-1449

IN THE
Supreme Court of the United States

MASSACHUSETTS FOOD ASSOCIATION, *et al.*,
Petitioners,
v.
MASSACHUSETTS ALCOHOLIC BEVERAGE CONTROL COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICI CURIAE* BEER DISTRIBUTORS OF MASSACHUSETTS, INC., WINE & SPIRITS WHOLESALERS OF MASSACHUSETTS AND MASSACHUSETTS PACKAGE STORES ASSOCIATION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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v.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Beer Distributors of Massachusetts, Inc., the Wine & Spirits Wholesalers of Massachusetts and the Massachusetts Package Stores Association, Inc. ("Amici") hereby move, pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, for leave to file the attached Amicus brief in opposition to the petition for certiorari. The grounds for this request are as follows:

1. Petitioners in this matter have consented to the filing of the Amicus brief. Their consent is filed with the Clerk of Court.

2. Respondents have not objected to the filing of this Amicus brief, but have declined to sign a letter of consent thereto.

3. Petitioners do not address the 21st Amendment in their Petition and Respondents have only noted but not argued the Amendment's application in their argument below, even though it is dispositive.

4. The Amicus brief presents the argument that the 21st Amendment bars Petitioners' Complaint because the three-store limit on ownership of retail liquor stores, which is the basis for this controversy, is within the "core powers" of the Amendment. The statutory provision, therefore, is immunized from challenge under the Supremacy Clause whether or not it conflicts with the Sherman Act.

WHEREFORE, Amici respectfully request that this motion for leave to file their Amicus brief be granted.

Respectfully submitted,

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March 30, 2000

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IN THE

Supreme Court of the United States

No. 99-1449

MASSACHUSETTS FOOD ASSOCIATION, *et al.*,
Petitioners,

v.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* BEER DISTRIBUTORS OF MASSACHUSETTS, INC., WINE & SPIRITS WHOLESALERS OF MASSACHUSETTS AND MASSACHUSETTS PACKAGE STORES ASSOCIATION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

The Amici herein are three trade associations: the Beer Distributors of Massachusetts, Inc. ("BDM"); the Wine & Spirits Wholesalers of Massachusetts ("WSWM"); and the Massachusetts Package Stores Association, Inc. ("MassPack").* Together they represent 26 wholesalers and approximately 600 retailers in the Commonwealth of Massachusetts who are engaged in the distribution and

* Pursuant to Supreme Court Rule 37.6, Amici state that no counsel for a party authored this brief in whole or in part, and no persons other than the Amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

sale of alcoholic beverages. Their operations are closely regulated by the Defendants herein.

The issue in this case as presented by Petitioners, whether the three-store retail ownership limitation in the Massachusetts Alcoholic Beverage Control Act, Mass. Gen. L. c. 138, § 15, is preempted by the Sherman Act, 15 U.S.C. § 1, could fundamentally alter how alcoholic beverage wholesalers and retailers of Massachusetts conduct their business. The motion of BDM, WSWM and MassPack to participate as Intervenor-Defendants in this matter was denied by the courts below, but they participated by submission of an Amicus brief with the parties' consent. The Amici believe that they can provide a different perspective for the Court's benefit because, while briefed below, neither party presents an argument herein on whether the 21st Amendment to the U.S. Constitution immunizes § 15 of the MABC from antitrust challenge.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 2 of the 21st Amendment provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This Court has ruled repeatedly, and without exception, that the "core power" conferred on the States by § 2 is the power to control the distribution and sale of imported alcoholic beverages.

The Massachusetts Alcoholic Beverage Control Act ("MABC Act") provision at issue, limiting to three the number of retail outlets that a single person or entity may own, Mass. Gen. L. c. 138, § 15, is a clear example of a State liquor law that falls within the purview of the 21st Amendment. Section 15's multiple ownership restriction serves several vital State interests directly related to the distribution of alcoholic beverages in Massachusetts, such as ensuring orderly market conditions, "controlling the

tendency toward concentration of power in the liquor industry," and "preserving the right of small, independent liquor dealers to do business." *Johnson v. Martignetti*, 374 Mass. 784, 792, 375 N.E.2d 290, 297 (1978) (upholding § 15 against challenges under the Due Process and Equal Protection Clauses).

Both the District Court and First Circuit below ruled that the three-store limit in § 15 of the MABC Act was "unilaterally imposed by government . . . to the exclusion of private control" and thus that § 15 was neither within the coverage of the Sherman Act nor subject to preemption under the Supremacy Clause. *Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Commission*, 197 F.3d 560, 566 (1st Cir. 1999) (quoting *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986)), *affirming*, 184 F.R.D. 217 (D. Mass. 1999). We agree that such a conclusion is mandated by this Court's precedents and we support Massachusetts' argument that the case does not warrant the grant of a writ of certiorari.

However, we separately argue herein, as we did below,[1] that the Court should reject the Petition for the additional

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[1] Both the District Court and First Circuit declined to address the 21st Amendment argument preserved by the State-Defendant and presented fully by the Amici. In its denial of party participation to the Amici as Intervenor-Defendants, the District Court ruled that the 21st Amendment (and state action immunity) arguments "appear more appropriate for consideration after some factfinding, if that is necessary." Pet. App. 26a n.7. The First Circuit also did not address the 21st Amendment argument but stated only that intervention was unnecessary because the Intervenors' "*other* legal arguments (for example, based on the Twenty-First Amendment) to sustain the statute. . . . were easily presented in amicus briefs." Pet. App. 12a (emphasis in original).

In accordance with the First Circuit's lead, the Amici file this brief on the 21st Amendment issue to ensure that the Court is fully apprised of the argument that the three-store ownership limit in § 15 of the MABC Act also is immune from challenge under the Supremacy Clause because it is within the State's core powers as

reason that § 15's three-store restriction is immune from challenge because of the 21st Amendment's reservation to the States of "virtually complete control over . . . how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Section 15 of the MABC Act is a basic structural requirement setting forth one of several criteria that must be satisfied for the issuance of a retail license. Accordingly, § 15 comes within the protective umbrella of the 21st Amendment and, in this circumstance, overrides any preemption by the Sherman Act under the Supremacy Clause Thus, this is not an appropriate case for the Court once again to consider the boundaries between state regulation and the Sherman Act.[2]

ARGUMENT

The history of the 21st Amendment demonstrates that the purpose of § 2 thereof was to empower the States

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defined in the Amendment. That the lower courts did not address the 21st Amendment does not prevent its consideration by this Court because it is not a fact-based issue (and the District Court identified no relevant factual questions) and its consideration now can fully resolve the case and avoid the necessity for a remand. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274 n.12 & 279 n.3 (1984) (majority and dissent agreed that 21st Amendment issue was properly before the Court although it was not argued below).

[2] Between 1982 and 1992, the Court addressed the metes and bounds of the state action immunity from federal preemption under the antitrust laws in ten cases. *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991); *Patrick v. Burget*, 486 U.S. 94 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260 (1986); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

not only to control the importation of alcoholic beverages, but also to regulate all aspects of their distribution and sale where importation was allowed. Distribution and sale in this context include ownership qualification requirements and, more specifically, the number of retail stores that one person or entity may control. Because the statute in question is one way by which the State controls the marketing of alcoholic beverages, it "fall[s] within the core of the State's power under the Twenty-first Amendment," *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (Stevens, J., plurality opinion), and therefore cannot be preempted by the Sherman Act.

I. THE HISTORY OF THE 21ST AMENDMENT CLEARLY SHOWS THAT A PRINCIPAL PURPOSE WAS TO ALLOW STATES "ABSOLUTE CONTROL" OVER THE DISTRIBUTION AND RETAIL SALE OF ALCOHOLIC BEVERAGES

The first purpose of the 21st Amendment was, of course, to end Prohibition.[3] If that were all, however, § 1's "repeal" of the 19th Amendment would have been sufficient.

Section 2 was an acknowledgment that the "noble experiment" had failed because the effort to establish one uniform standard through national regulation did not take account of "local sentiment and local habits." 76 Cong. Rec. 4146 (1933) (statement of Senator Wagner). Accordingly, when the House version of the Amendment contained no express statement of State authority to regu-

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[3] Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Constitution, XXI Amendment.

late the importation and distribution of alcohol, *see* H.R.J. Res. 480, Senator Blaine, the chairman of the Judiciary Committee and primary sponsor of the Amendment, proposed the addition of § 2 "to restore to the States by constitutional amendment *absolute control* in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." 76 Cong. Rec. 4143 (1933) (emphasis added). As a consequence, the Senate approved the addition of § 2 because, as revised, the 21st Amendment would leave it "entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported." *Id.* at 4225 (statement of Sen. Swanson; concurrence of Sen. Robinson). *See generally 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 353-57 (1987) (O'Connor, J., dissenting).

This conclusion is confirmed by the Senate's consideration and rejection of a proposed § 3 that would have granted Congress "concurrent power" to regulate or prohibit sales of alcoholic beverages in on-premises establishments (i.e., restaurants and bars). *See* S. Rep. No. 1022, at 1 (1933). It was rejected by the Senate because the grant of such authority to Congress to regulate distribution would be contrary to the objectives of § 2. 76 Cong. Rec. 4143 (1933) (Senator Blaine); *see id.* at 4177-78 (Senator Black). State ratifying conventions similarly understood that the grant of full authority to the States to regulate who, how, where and when alcoholic beverages are to be distributed and sold within their boundaries was a central purpose of the 21st Amendment. *Ratification of the Twenty-first Amendment to the Constitution of the United States* 172 (E. S. Brown ed. 1938).

II. STATES HAVE "PLENARY POWER" TO REGULATE THE DISTRIBUTION AND SALE OF ALCOHOLIC BEVERAGES

The judicial construction of the scope and effect of the 21st Amendment has often been said to have changed substantially since 1933. It was initially interpreted as exempting all state regulation from challenge under the Commerce Clause. Later cases, however, rejected its application to state laws affecting constitutionally protected individual rights or federal laws not related to the "core powers" identified in § 2 of the Amendment. These cases are not inconsistent; they simply cover different subjects. This Court always has and continues to read the "core powers" of § 2 as granting States "plenary power to regulate and control . . . the distribution, use, or consumption of intoxicants within [its] territory." *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-15 (1996) (state regulatory power over distribution "largerly unfettered by the Commerce Clause") (citation omitted). Thus, under the 21st Amendment, the Court has given state controls on the structure of the distribution system a strong "presumption of validity." *North Dakota*, 495 U.S. at 433.

Nor are these merely isolated examples. Cases holding that the 21st Amendment does not apply to price fixing, discriminatory classifications, etc., have invariably taken special note of the core power immunity. For example in *Craig v. Boren*, 429 U.S. 190, 205-07 (1976), *reh'g denied*, 429 U.S. 1124 (1977), after reviewing the history of State regulation and of the adoption of the 21st Amendment, the Court observed that State controls focused specifically on importation, transportation and distribution are immune because it is "transparently clear" that they are within the core powers protected by

§ 2 of the Amendment. *Id.* at 207. *See also id.* at 215 (Stewart, J., concurring) ("Every State has broad power under the Twenty-first Amendment to control the dispensation of alcoholic beverages within its borders."). Other illustrative cases include: *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573, 584 (1986) (21st "Amendment gives the States wide latitude to regulate the importation and distribution of liquor within the territories"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 282 (1984) (Stevens, J., dissenting) (decisions have "consistently reaffirmed" and "repeatedly acknowledg[ed] the broad nature of state authority to regulate commerce in intoxicating liquors"); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966)[4] ("wide latitude" given to State liquor regulation); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 337 (1964) (Black, J., dissenting) (States given "plenary powers").

Of course, State liquor control laws imposing requirements outside the core areas of importation, transportation and distribution can be preempted by contrary federal law. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. supra.* But, "[n]othing in *Bacchus* or the other later cases overrules the principles iterated in the *Boren* and *Beam* cases" that liquor regulation within the "core powers" granted to the States continues to be immune under the 21st Amendment. *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). *Accord 44 Liquormart*, 517 U.S. at 514-15 (quoted p. 7, *supra*).

To be sure, where the challenged State laws have involved authorization of private conduct directly setting

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[4] The price affirmation law upheld in *Seagram*, not in issue here, was abrogated in *Healy v. Beer Institute*, 491 U.S. 324 (1989).

wholesale or retail *prices* of such products by private parties, the Court has found that the State liquor laws preempted by the Sherman Act were not immunized by the 21st Amendment. The control of price competition, at least by private parties, was not the kind of State control envisaged by § 2 of the 21st Amendment because it does not relate to "the structure of the distribution system." *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, supra at 110 (State authorized *resale price maintenance* preempted by Sherman Act); *see also Healy v. Beer Institute*, 491 U.S. 324 (1989) (*price* affirmation law requiring that in-state prices charged by brewers not exceed lowest price for beer products in border States); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (posting law delegating *price* setting authority to private parties); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573 (1986) (requiring distillers not to sell to wholesalers at a *price* no higher than the lowest price they charged anywhere in the U.S.).

However, where the primary interests of § 2 of the 21st Amendment are being served by the State regulation and price is not controlled by private agreement, the 21st Amendment trumps any application of the Supremacy Clause to overturn State law. None of the Supremacy cases identified above involved an ownership or locational restriction. None involved typical qualification requirements regulating who could own a retail establishment (e.g., non-felons with experience and adequate assets) or the number of retail outlets permitted in any community (e.g., quota and locational limitations).

North Dakota v. United States, 495 U.S. 423 (1990) is illustrative of the latitude given to State laws which regulate the distribution of alcoholic beverages. There, the Court unanimously upheld a "reporting requirement" under which out-of-state liquor distributors had to report

the volume of all liquor shipped to federal enclaves including military bases. A second regulation imposing a "labeling requirement" under which out-of-state distributors had to label liquor bottles shipped to a federal enclave so as to identify that the liquor was for consumption only within the federal enclave was upheld more narrowly on a 5-4 vote. Although there was no majority opinion on the labeling issue, both the 4-member plurality by Justice Stevens and the concurrence by Justice Scalia reaffirmed that regulation of the distribution system was within the State's core powers protected by the 21st Amendment as follows:

> [I]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate. (Stevens, J., plurality opinion) (495 U.S. at 432)
>
> The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." (Scalia, J., concurring) (495 U.S. at 447)

Under these principles, § 15 of the MABC Act fits within this 21st Amendment framework. It limits the number, and therefore the power, of retailers; past experience shows that such power often has been abused. *Cf. Actmedia, Inc. v. Stroh,* 830 F.2d 957, 966 (9th Cir. 1986) (three-tier ownership restrictions designed to control "dominance or undue influence").

III. MASSACHUSETTS' THREE-STORE OWNERSHIP LIMITATION FURTHERS CORE CONCERNS OF THE 21ST AMENDMENT AND THUS SURVIVES A SUPREMACY CLAUSE CHALLENGE

The three-store ownership limit in § 15 of the MABC Act is but one of a series of requirements by which Massachusetts closely regulates who may be licensed as a retailer (or wholesaler) of alcoholic beverages (§§ 12, 15 & 18), the personal background of those with ownership interests (§§ 12 & 15), the interests of manufacturers and wholesalers in retail stores (§ 25), the number of on- and off-premises outlets permitted in the State (§§ 15 & 17), the location of on-premise outlets as approved by local committees (§§ 12, 16C & 16D), the hours and days of operation of retail sales (§§ 12, 15, 33, 33A & 33B), the adulteration of alcoholic beverages sold at retail (§ 16), the collection of sales (or excise) taxes (§ 21), the reporting to the MABCC of all purchase orders and sales invoices by wholesalers (§ 18), the acceptance of unannounced inspections of wholesaler records and premises (§ 12A, 18, 19, 19B & 19C), and so forth. *See* Mass. Gen. L. c. 138, §§ 2 *et seq.*

Theoretical arguments can, of course, be asserted that each of these provisions, examined in isolation and out of context, could have deleterious effects on competition and thus be within the reach of the Sherman Act (assuming that other elements of an antitrust offense are shown). The requirement, for example, that retail establishments, including bars and restaurants, must restrict sales to prescribed hours or lose their licenses (MABC Act §§ 12 & 15), can be said to be a limitation on output. *Cf. In the Matter of Detroit Auto Dealers Ass'n, Inc.*, 111 F.T.C. 417 (1989), *aff'd*, 955 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 973 (1992) (joint advertising agreement by auto dealers to close their showrooms at 6 p.m. held to be an agreement to shorten business hours and, thus,

an output reduction). The same can be said for the requirements that retail licensees must be of good character and without a felony record, and that they must not sell liquor to minors. MABC Act §§ 12, 15, 34 & 64. Those restrictions limit the number of potential sellers and buyers, thereby suppressing both supply and demand. Indeed, other provisions in the MABC Act, not challenged by Petitioners herein, set express quotas on the number of off-premise outlets (e.g., no more than 250 in Boston) as well as the number and location of retail stores in their locales (§ 17). *See also Victoria, Inc. v. ABCC*, 33 Mass. App. Ct. 507, 512, 602 N.E.2d 578, 581 (1992) (Commission to look at local public interest in addition to population in granting licenses).

In fact, however, the purpose and effect of these restrictions is to protect public health and safety, to prevent unauthorized trafficking (and diversion), to foreclose underage consumption, and to collect excise and sales taxes. *See, e.g.* MABC Act § 23 ("[t]he provisions for the issue of licenses and permits hereunder . . . are enacted with a view only to serve the public need and in such a manner as to protect the common good"); *Connolly v. ABCC*, 334 Mass. 613, 618-19, 138 N.E.2d 131, 135-36 (1956) (ABCC could consider patronage by school children, proximity to churches and propriety in evaluating license application). According to Massachusetts' highest court in *Johnson v. Martignetti, supra*, the ownership limitation in § 15 serves multiple public interest objectives, none of which involves price setting or output restriction:

> Concentration of retailing in the hands of an economically powerful few has been thought to intensify the dangers of liquor sales stimulations, thereby threatening trade stability and promotion of temperance. Regulation of the number of licenses issued,

> therefore, aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; avoiding practices such as indiscriminate price cutting and excessive advertising; and preserving the right of small, independent liquor dealers to do business. (374 Mass. at 792, 375 N.E.2d at 297)

Limiting the number of retail outlets controlled by one person ensures more effective enforcement of the State's liquor control program. The retail owner is more likely to directly oversee operations where three stores are the maximum, and the threat of a license revocation or suspension is likely to present a more serious sanction to the small business as compared to the chain store or supermarket. Similarly, control of market concentration and retail store ownership interests can be critical in preventing the misuse of economic power and in obtaining the benefits of competition. It is, for example, not unusual for public policy to impose limits on the number of regulated entities one person may control. *See* 47 C.F.R. § 73.3555 (Federal Communications Commission national multiple ownership rules for television stations); T. Krattenmaker & L. Powe, *Regulating Broadcast Programming* 94-96 (1994). *See also* U.S. Dept. of Justice & Federal Trade Commission, *Joint Horizontal Merger Guidelines* § 2.0 (1992).[5]

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[5] This Court also has upheld simlar restrictions outside the field of liquor control against Sherman Act and Due Process challenges. *E.g., New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (location of new automobile dealerships); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (ownership interest in retail service stations), *reh'g denied sub nom. Shell Oil Co. v. Governor of Maryland*, 439 U.S. 884 (1978); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) (ownership interest in pharmacies). *See also Boston Neighborhood Taxi Ass'n v. Dept. of Public Utilities*, 410 Mass. 686, 575 N.E.2d 52 (1991) (limit on number of taxi licenses).

Thus, when faced with a challenge to state regulation of the number and location of retail liquor stores, the lower courts have upheld such restrictions under the 21st Amendment. In *Simms v. Farris*, 657 F. Supp. 119 (E.D. Ky. 1987), *aff'd per curiam*, 840 F.2d 18 (6th Cir. 1988), the court upheld a limitation of the number and location of retail liquor stores in rural areas under the 21st Amendment because, as the District Court reasoned, the restriction was designed "to facilitate the ease of policing" compliance with state liquor regulations. 657 F. Supp. at 124. On review, the Sixth Circuit was more direct, upholding this "attempt by Kentucky to regulate the sale and use of liquor within its borders" because the State's authority was being applied "to control the distribution and use of intoxicating beverages." 840 F.2d at 18. *Accord Prices Corner Liquors, Inc. v. Delaware Alcoholic Beverage Control Commission*, 705 A.2d 571, 576 (Del. S.Ct. 1998) (upholding more restrictive locational requirements for off-premises retail liquor stores in unincorporated areas).

Similarly, Massachusetts' limit on the number of retail liquor stores that one person may control is justified by its policy of control over all aspects of the distribution of alcoholic beverages. By restricting that number to no more than three stores, the State has imposed a direct limit on the market power exercised by any retail store.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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No. 99-1449

IN THE

Supreme Court of the United States

MASSACHUSETTS FOOD ASSOCIATION, *ET AL.*,
Petitioners,

v.

MASSACHUSETTS ALCOHOLIC BEVERAGES CONTROL COMMISSION, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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March 30, 2000

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Question Presented

Whether the Sherman Act applies to a state statute limiting the number of off-premises retail liquor licenses that may be held by any one person in the Commonwealth of Massachusetts, where the statute is the unilateral act of a state and does not grant to any private person any pricing or any other discretion to act anticompetitively.

Parties.

The parties in this case are Massachusetts Food Association; Roche Bros. Supermarkets, Inc.; The Stop & Shop Supermarket Company; Packaging Center, Inc.; BJ's Wholesale Club, Inc.; Mormax Corporation; The Edwin R. Sage Company, Inc.; Trader Joe's Co.; and Trader Joe's East, Inc., petitioners; and the members of the Massachusetts Alcoholic Beverages Control Commission, in their official capacities, respondents.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondents, members of the Massachusetts Alcoholic Beverages Control Commission, in their official capacities ("respondents"), submit this brief in opposition to the petition for writ of certiorari (the "petition").

Decisions Below

The opinion of the United States Court of Appeals for the First Circuit, reproduced at pages 1a - 13a of Appendix A to the petition, is reported at 197 F.3d 560 (1st Cir. 1999). The earlier decision of the United States District Court for the District of Massachusetts is reported at 184 F.R.D. 217 (D. Mass. 1999), and it is included in Appendix B to the petition at pages 14a - 38a.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered December 2, 1999. See Appendix A to Pet. at 2a. The petition was filed and docketed on March 1, 2000; respondents received formal service of the petition on March 6, 2000. The petitioners invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The federal constitutional and statutory provisions at issue are the Supremacy Clause of the United States Constitution, and section 1 of the Sherman Act, 15 U.S.C. § 1.

The Supremacy Clause provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, cl. 2.

Section 1 of the Sherman Act provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal.

15 U.S.C. § 1.

As to the relevant Massachusetts statute, the Commonwealth sets forth portions of the text of Mass. Gen. Laws c. 138, § 15 (1995 and Supp. 1999), as follows:

> The local licensing authorities in any city or town which votes to authorize the granting of licenses for the sale of all alcoholic beverages, and such authorities in any city or town which votes to authorize the granting of licenses for the sale of wines and malt beverages only, may grant licenses for the sale at retail of such alcoholic beverages or wines and malt beverages, as the case may be, not to be drunk on the premises, to applicants therefor who are citizens and residents of the commonwealth, or partnerships composed solely of such citizens and residents or to corporations organized under the laws of the commonwealth and whereof all directors shall be citizens of the United States and a majority residents of the commonwealth. **No person, firm, corporation, association, or other combination of persons, directly or indirectly, or through any agent, employee, stockholder, officer or other person or any subsidiary whatsoever, shall be granted, in the aggregate,**

> more than three such licenses in the commonwealth, or be granted more than one such license in a town or two in a city. No such license shall be granted except to an applicant approved by the commission.

(Emphasis added).

Statement of the Case

I. PROCEEDINGS BELOW.

Petitioners filed a complaint in the United States District Court for the District of Massachusetts challenging that portion of Mass. G.L. c. 138, § 15, which provides that no person may hold more than three licenses to sell alcoholic beverages at retail (off-premises) in the Commonwealth, on the ground that this portion of the statute violates section 1 of the Sherman Act.[1] Petitioners in effect claimed that the statutory limitation constitutes a "hybrid" restraint under applicable Supreme Court precedent, and that the test for state action immunity applicable to hybrid restraints had not been met.

Petitioners appealed from the District Court's decision granting respondents' motion to dismiss the amended complaint. The United States Court of Appeals for the First Circuit affirmed the District Court's decision. The Court of Appeals held that the three-license limit was a unilateral restraint not

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[1] Section 1 of the Sherman Act provides in relevant part, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal." 15 U.S.C. § 1.

subject to the Sherman Act's prohibitions. Appendix A to Pet. at 9a, citing Fisher v. City of Berkeley, 475 U.S. 260, 266 (1986). Petitioners filed a petition for writ of certiorari on or about March 1, 2000.

Reasons for Denying the Writ

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Supreme Court Rule 10. The Court will grant such a writ "only for compelling reasons." Id. The purpose of certiorari jurisdiction is to permit the Court to select cases "of such gravity and general importance" as to warrant plenary review. In re Woods, 143 U.S. 202, 206 (1892). Accordingly, a "petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Supreme Court Rule 10.

For the reasons set forth below, the petition does not satisfy the traditional criteria which guide the Court's discretionary review, and it should be denied.

I. THE COURT'S DECISION CORRECTLY APPLIED RELEVANT SUPREME COURT PRECEDENT; THERE IS NO SUBSTANTIAL CONFLICT OF DECISIONS WITHIN THE CIRCUIT COURTS THAT WOULD WARRANT CERTIORARI.

A. *The Sherman Act Does Not Apply to a Unilateral Restraint Imposed by a State Legislature as an Act of Government.*

As the Supreme Court has observed, "when a state legislature adopts legislation, its actions constitute those of the State, . . . and ipso facto are exempt from the operation of the antitrust laws." Hoover v. Ronwin, 466 U.S. 558, 567-68 (1984). In Hoover, the Court stated that the "reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anti-competitive fashion, but that the State itself has chosen to act." Id. at 574. In Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073, 1076 (1st Cir. 1993), the First Circuit elaborated on the Supreme Court's statement of the law:

> A half century ago, the Supreme Court determined, in Parker v. Brown, 317 U.S. 341, . . . (1943), that Congress had not intended the federal antitrust laws to apply to trade restraints or monopolies imposed by state governments. Although the antitrust laws aim at competitive markets, the Court in Parker recognized that governments often restrict competition for public purposes. The actions of state governments, no less than those of the federal government itself,

were deemed not to fall within the constraints of the antitrust laws.

In this case, the challenged "anticompetitive" conduct is unilateral action by the State Legislature to prohibit any person or entity from holding more than three retail off-premises liquor licenses.[2] This is a quintessential unilateral restraint in the form of pure government regulation in an area at the core of the State's police powers. Fisher v. City of Berkeley, 475 U.S. 260, 269-270 (1986). This activity, even if "anticompetitive" in some sense, is nonetheless by definition authorized by the state. Therefore, no "violation" of the antitrust laws exists because the Sherman Act simply does not apply. "The rationale of Parker was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 375 (1991).

Petitioners' argument distorts the Court's analysis in Fisher. For purposes of analyzing a restraint imposed by government, rather than by private agreement, the issue is whether, and to what extent, the statute grants a "'degree of private regulatory power'" to private market participants, in this case, retailers of alcoholic beverages. Fisher, 475 U.S. at 268, quoting Rice v. Norman Williams Co., 458 U.S. 654, 666 n.1 (1982) (Stevens,

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[2] Section 15, in its entirety, sets forth a complex and detailed statutory scheme for granting licenses for the sale of alcoholic beverages at retail for off-premises consumption. It is part of the Commonwealth's comprehensive regulation of the alcoholic beverages industry.

J. concurring). If the statute does so, then it constitutes a "hybrid" restraint. See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (resale price maintenance); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (same). Here, the statute confers no discretion whatever on retailers. Indeed, it is the statute itself which embodies the "anticompetitive" conduct plaintiffs challenge. Section 15 simply strips retailers of a power that they would otherwise have had in a completely free market. Where a statute does not confer on market participants discretion that they would not otherwise have had, the so-called "hybrid" restraint analysis of Fisher does not apply. See Fisher, 475 U.S. at 267 ("[a] restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.") See also 1 P. Areeda and H. Hovenkamp, Antitrust Law, ¶ 217b3, at 314 (rev. ed. 1997). As the First Circuit observed, "[i]n this case, the state has not ordered or authorized private parties to engage in conduct that, absent immunity, would even arguably violate the antitrust laws; there is no private agreement or arrangement between retailers as to the number of retail outlets and therefore no violation to be shielded. The state simply insists upon licensing retail liquor stores -- as it does for many businesses or professions -- and limits the number of licenses to three per owner." Appendix A to Pet. at 6a.

By contrast, under Parker and its progeny, when a state

imposes a hybrid restraint[3] -- as opposed to the unilateral restraint at issue here -- and a private actor engages in anticompetitive conduct pursuant to such a restraint, he is immune from the antitrust laws (1) if he engages in the activity pursuant to a clearly articulated and affirmatively expressed state policy and (2) if the anticompetitive activity is actively supervised by the state. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). However, neither of these tests apply to a state that imposes a restraint as an act of government, especially where the restraint confers no authority on private actors to act anticompetitively. See Fisher, 475 U.S. at 267.

As the First Circuit implicitly recognized, Appendix A to Pet. at 6a, the fact that the statute could conceivably have an anticompetitive effect is irrelevant. As this Court stated in upholding a Maryland statute that prohibited producers or refiners of petroleum products from operating retail service stations within Maryland and required that all temporary price reductions be extended uniformly to all service stations supplied:

> [Appellants' argument] is merely another way of

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[3] A hybrid restraint, as defined by this Court in Fisher, is one in which governmental "nonmarket mechanisms merely enforce private marketing decisions. . . . Where private actors are thus granted a degree of private regulatory power, . . . the regulatory scheme may be attacked under § 1." Fisher, 475 U.S. at 268 (1980) (citing Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) and California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)).

> stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act -- our "charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978) (citations omitted).

Petitioners' extensive reliance on Rice is misplaced. Rice must be read in the context of the cases of Fisher, Duffy[4], and Midcal. These cases, read together, demonstrate that where, as here, a state imposes a restraint as an act of government and where the restraint does not provide the individual or entity regulated with "a degree of private regulatory power," Fisher, 475 U.S. at 286, the Sherman Act simply does not apply.

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[4] In 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987), the Supreme Court invalidated a state regulatory scheme that effectively allowed one level of the market (wholesalers) to dictate the prices at which the next lower tier of the market (retailers) sold alcohol.

B. *No Real and Embarrassing Conflict Exists Among the Circuits Which Have Decided this Issue.*

The petition asserts that there is a conflict between the decisions of the First and Ninth Circuits. Pet. at 12-14.

The First Circuit's decision that a unilateral restraint imposed by a state is not subject to the Sherman Act is not inconsistent with the Ninth Circuit's decision in Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987), cert. denied, 484 U.S. 1061 (1988), and is consistent with other Ninth Circuit precedent. In Miller, the Ninth Circuit concluded that the Oregon pricing scheme for the sale of beer and wine, which involved price-setting by private parties, constituted a hybrid restraint. 813 F.2d at 1350-51. Once that conclusion was reached, the Court applied a hybrid restraint analysis.[5] By

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[5] One may disagree with the determination by the Ninth Circuit that the regulatory scheme in that case constituted a hybrid restraint, but that does not militate in favor of granting the petition. Cf. U.S. Supreme Court Rule 10 (certiorari will not be granted where the error in the decision results from "misapplication of a properly stated rule of law."). Indeed, it can easily be argued that Miller is not a correct application of the law. Miller's holding was based upon a faulty analysis of the reasoning of two cases, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) and Midcal. In Schwegmann, the Court analyzed the nature and effect of a Louisiana statute which not only permitted contracts for resale price maintenance between distributors and retailers, but also enforced those contracts against nonsigners of the contracts at the retail level. Schwegmann, 341 U.S. at 387. The Court noted that such contracts, even absent enforcement against nonsigners, would constitute price fixing and

contrast, the First Circuit in this case decided that the statute's three-license limitation was a unilateral, not a hybrid, restraint. Therefore, the hybrid restraint analysis of Miller never came into play.

Other cases decided by the Ninth Circuit demonstrate that there is no fundamental conflict between the First and Ninth Circuits in this regard. For example, in Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869 (9th Cir. 1987) (exclusive franchise contract between SIDA and the Hawaii Department of Transportation), the Ninth Circuit held that "state executives and executive agencies, like the state supreme court, are entitled to Parker immunity for actions taken" within their lawful authority, regardless of whether the particular actions at issue or their anticompetitive effects were

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therefore a per se violation of the Sherman Act. Id. at 386. The Court recognized that the statute at issue extended beyond what was both permitted and specifically contemplated by the Miller-Tydings Act--that is, contracts prescribing minimum prices for the resale of specified commodities, so long as such contracts were permitted under local law--to require enforcement of such contracts against nonsigners. The effect would be to fix prices at the retail level by the entry of one distributor into one contract with one retailer, thereby compelling horizontal price fixing by all retailers. Schwegmann, 341 U.S. at 389-390. The other case relied on by the Miller court, Midcal, similarly turned on the requirement of resale price maintenance. Miller sought to apply Midcal and Schwegmann to the regulations there at issue, holding that the regulations "compel[led] activity that would otherwise be a per se violation of the Sherman Act." Id. at 1349. However, the fact that the Miller court applied an arguably faulty label to a regulatory scheme does not create the type of conflict among the circuits that would justify the granting the petition.

contemplated by the legislature. 810 F.2d at 876. "When the state executive or executive agencies act within their lawful authority, their acts are those of the sovereign." Id. Similarly, in Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990), while applying the clear articulation test to an entity determined not to merit treatment as a sovereign, the Ninth Circuit nonetheless acknowledged that "the Supreme Court has construed the Sherman Act not to apply to anti-competitive acts undertaken by a state in its sovereign capacity." Id. at 1456. See also Traweek v. City and County of San Francisco, 920 F.2d 589, 591 (9th Cir. 1990) (anticompetitive actions of a state are immune from the antitrust laws; state action immunity extends to municipalities where municipality demonstrates that the state policy authorizing the challenged action has been clearly articulated); Kern-Tulare Water District v. City of Bakersfield, 828 F.2d 514, 518 (9th Cir. 1987) (no federal antitrust "liability" arises for an anti-competitive act by a state acting as sovereign; state may sanction anti-competitive municipal activities where state policy authorizing challenged restraint is clearly articulated and affirmatively expressed), cert. denied, 486 U.S. 1015 (1988).

To the extent that there is any perceived conflict among these decisions, this does not support plenary review at this time. See Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955) (conflict in lower courts will not justify review unless it is "real and embarrassing") (emphasis added) (citation omitted).

II. THIS CASE PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

Because the statute is not subject to the Sherman Act, this case presents no significant issue of federal law requiring resolution by the Court. The MFA decision is entirely consistent with prior precedent of this Court. Fisher, 475 U.S. at 267. "The rationale of Parker was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 375 (1991).

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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ARGUMENT

I. RESPONDENTS DO NOT REFUTE THE CLEAR AND DIRECT CONFLICT BETWEEN THE FIRST AND NINTH CIRCUITS.

The argument advanced by Respondents does not refute the split in the circuits occasioned by the First Circuit's decision in *Massachusetts Food Association v. Massachusetts Alcoholic Beverages Commission.* Pet. Br. at 14a.

Specifically, Respondents fail to deal head-on with the Ninth Circuit's holding that preemption of the Sherman Act, 15 U.S.C. § 1, does not turn on whether there is an agreement among private parties. *See Miller v. Hedlund*, 813 F.2d 1344, 1349 (9th Cir. 1987) (rejecting need to show existence of an express agreement between private parties as condition for Sherman Act preemption). Rather than deal with the *Midcal-Duffy* line of cases, *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), Respondents instead string together, without discussion of the facts or legal analysis, a series of Ninth Circuit decisions that do not even address this issue, but simply evaluate the two-prong, state-action immunity analysis established in *Parker v. Brown*, 317 U.S. 341 (1943). *See Charley Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987) (no discussion of private agreements when addressing issue of *per se* violation of Sherman Act; limiting its analysis to issues of *Parker* immunity); *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989) (same); *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514, 518 (9th Cir. 1987) (same); *Traweek v. City and County of San Francisco*, 920 F.2d 589, 591 (9th Cir. 1990) (same). For the purposes of this appeal, the *Parker* immunity is not before the Court, Pet. Br. at 37a, because it is conceded that Petitioners' factual pleadings as to the absence of active state supervision are taken as true.

In sharp contrast, the First Circuit created whole-cloth a novel "private agreement" requirement for Sherman Act preemption, finding it therefore unnecessary to even consider the two-prong inquiry of *Parker* immunity. Therein lies the conflict among the circuits: the imposition by the First Circuit of a prerequisite "private agreement" among private parties that expressly was rejected by the Ninth Circuit.

Indeed, Respondents implicitly concede the conflict in the circuits by attacking the reasoning of the Ninth Circuit in *Miller*. Resp. Br. at 11, n.5. This argument is not only inconsistent with Respondent's position that *Miller* was decided in a manner that was in harmony with both Ninth and First Circuit precedent, *see* Resp. Br. at 11, but also fails to address the Ninth Circuit's explicit rejection of the necessity of a private agreement for Sherman Act preemption.

In the face of this undeniable conflict, Respondents are forced to allege without analysis or explanation that the split between the First and Ninth Circuits is not "real and embarrassing." *See* Resp. Br. at 13 (quoting *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955)). Quite to the contrary, the issue involved in the conflict deeply impacts whether federal law such as the Sherman Act will be applied uniformly across the nation. *See Midcal*, 445 U.S. at 110. This cannot be achieved without clear rules setting forth the limited situations in which a state statute will be preempted by federal law. As the First Circuit recognized, the present state of Sherman Act preemption "case law is not entirely coherent." Pet. Br. 4a. The split between the Ninth and the First Circuits leaves in doubt the validity of state alcohol laws facially prohibiting retailers from competing in at least eleven states. Pet. Br. at 11, n.2. This Court's guidance is critical to remove the present ambiguities that result from the conflict between the First and Ninth Circuits.

II. THE FIRST CIRCUIT'S DECISION CANNOT BE RECONCILED WITH SUPREME COURT PRECEDENT.

To avoid the precepts of the *Midcal-Duffy* line of cases, Respondents also boldly assert that Petitioners unduly rely on *Rice* without regard to other preemption case law. *See* Resp. Br. at 10. It is Respondents, however, that should be accused of such narrow-sightedness. Respondents cling to language parsed from the pages of the decision from *Fisher v. Berkeley*, 475 U.S. 260 (1986), without reconciling that case with the modern trilogy of Sherman Act preemption cases decided by this Court, namely *Midcal, Rice* and *Duffy*. Indeed, Respondents' only mention of *Duffy* occurs in a footnote devoid of any substantive analysis. *See* Resp. Br. at 10 n. 4. Absent such analysis, it is difficult to accept Respondents' further assertion that the Court of Appeal's decision is "entirely consistent with prior precedent of this Court." *See* Resp. Br. at 14.

As explained extensively in Petitioner's petition, *Midcal, Rice, Fisher* and *Duffy* establish that state statutes authorizing or compelling unlawful behavior that irreconcilably conflicts with the Sherman Act are facially preempted by the Sherman Act unless the statute meets the "active supervision" standard set forth in the *Parker* immunity inquiry—an analysis that was never initiated by the First Circuit in the present case. Pet. Br. at 7-12. No pronouncement from this Court, however, has ever suggested that the Sherman Act preemption analysis is short-circuited and the *Parker* test wholly disregarded simply because there is no agreement among private parties.

Here, the Massachusetts statute severally limits competition among private parties by restricting a retailer's number of outlets; the State otherwise is ignorant of the actual effects in the marketplace. That is because retailers retain the power to decide where they will compete and what prices they will charge. Similarly, in *Midcal* and *Duffy* the state interfered in the com-

petitive market but allowed private parties to exercise private discretion over the prices they charged. *See Duffy*, 479 U.S. at 337; *Midcal*, 445 U.S. at 99. It is this grant of "a degree of private regulatory power" that warranted preemption in *Midcal* and *Duffy* and that warrants the same treatment here.[1]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[1] Reliance on the 21st Amendment in this Petition is without any factual or procedural basis. Respondents do not assert any 21st Amendment basis for defending the Massachusetts statute at this stage of the proceedings. With respect to the *Amicus Curiae* brief filed by The Beer Distributors of Massachusetts, Inc., the Wine & Spirits Wholesalers of Massachusetts and the Massachusetts Package Stores Association, the Petitioners simply note that this is an appeal from a granting of a motion to dismiss—not a motion for summary judgment—and all parties to the litigation and all lower courts properly deferred any 21st Amendment considerations. Moreover, none of the relevant Sherman Act preemption cases, such as this Court's decisions in *Midcal, Rice* or *Duffy*, or their numerous progeny relied on the 21st Amendment to save a state alcohol statute from Sherman Act preemption. Indeed, this Court in *Duffy* and *Midcal* explicitly rejected the 21st Amendment claims. See *Duffy*, 479 U.S. at 346; *Midcal* 445 U.S. at 107-110.